No. 348

# In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

*v.*

THE UNITED STATES

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

# INDEX

CITATIONS

Cases:

Cases—Continued. Page



Statutes:

Statutes—Continued. Page

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### OPINION BELOW

The opinion of the Court of Claims (R. 21–39), as modified on motion for a new trial (R. 39–42), is reported in 93 C. Cls. 500. Decisions at earlier stages of this litigation are reported in 82 C. Cls. 135 and 299 U. S. 417.

### JURISDICTION

The judgment of the Court of Claims was entered on January 6, 1941 (R. 39). The court allowed a motion by petitioner for a new trial, and on May 5, 1941 modified its findings and opinion (R. 39–43). The petition for a writ of certiorari was filed August 5, 1941; it was granted October

13, 1941 (R. 74). The jurisdiction of this Court rests on section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)).

## QUESTIONS PRESENTED

1. Whether the Government is liable to the Seminole Nation on account of the diversion to loyal refugee Indians during the Civil War of payments due under Article VIII of the Seminole Treaty of 1856.

2. Whether the payment of per capita annuities, due under Article VIII of the same treaty, to the tribal treasurer and Seminole creditors pursuant to resolution of the Seminole General Council discharged the obligation of the United States.

3. Whether similar payments made to the United States Indian Agent for the Seminoles pursuant to statute and disbursed by him for proper purposes created a valid claim in the Seminole Nation.

4. Whether payments for the support of schools, under Article III of the Seminole Treaty of 1866, was properly made to the tribal treasurer.

5. Whether the United States has discharged its obligation under Article VI of the same treaty to construct suitable agency buildings at a cost not exceeding $10,000.

6. Whether section 19 of the Curtis Act prohibited payments by the Government to the tribal treasurer, totalling $864,702.58, during the fiscal years 1899 to 1907; and, if so, whether the tribe

thereby acquired any right of action against the United States.

7. Whether, if the Government's obligations with respect to the affirmative claims of petitioner were not discharged *pro tanto* by corresponding payments made by the United States in attempted satisfaction of the claims, the amounts of those payments are allowable as gratuity offsets in favor of the Government.

8. Whether numerous other sums of money spent by the Government were expended gratuitously for the benefit of the Seminoles and were properly allowed by the Court of Claims as gratuity offsets.

## STATUTES INVOLVED

The relevant provisions of the statutes and treaties involved in this case are set forth in chronological order in the Appendix, which is printed under separate cover.

## STATEMENT

The Seminole Nation filed its original petition in this case on February 24, 1930, seeking recovery of trust funds alleged to have been wrongfully expended by the United States since July 1, 1898 (R. 1). In 1934 the petition was amended to include additional claims against the United States: recovery was asked for funds alleged to have been wrongfully expended before as well as after July 1, 1898, and for moneys alleged to have been wrongfully withheld under numerous trea-

ties and statutes dating back to 1856. These claims, thirteen in number and totalling $1,746,013.23, were examined by the court below, which rendered a judgment in 1935 (82 C. Cls. 135, 144) holding the United States liable to the Seminoles for ten items[1] totalling $1,317,087.27. The Government sought certiorari as to seven items ($1,307,478.02), raising jurisdictional objections against the consideration of six, and objections on the merits against all seven. The writ was granted (299 U. S. 526).

On its review of the case this Court agreed with the Government that the judgment as to six items ($1,153,022.72) was improper for want of jurisdiction in the Court of Claims (299 U. S. 417, 421–427): these items had been advanced by petitioner for the first time in its amended petition filed in 1934, long after the expiration of the period of limitation prescribed by the special jurisdictional Act of May 20, 1924, 43 Stat. 133, as amended by the Joint Resolution of February 19, 1929, 45 Stat. 1229. As to the merits of these six claims this Court expressed no opinion. On examining the merits of the seventh item ($154,455.30) this Court disallowed the claim except to the extent of $490.20 (299 U. S. 417, 431). The judgment of the Court of Claims as to all seven items was accordingly re-

[1] Three of the thirteen claims were disallowed in their entirety while three others were disallowed in part.

versed. *United States* v. *Seminole Nation*, 299 U. S. 417, 432.[2]

The jurisdictional barrier was subsequently removed by the Act of August 16, 1937, 50 Stat. 650, which conferred jurisdiction on the Court of Claims to reinstate and retry on their merits claims previously dismissed because set up by amended petition after the expiration of the time limit fixed in the original jurisdictional acts. The Seminole Nation accordingly filed a second amended petition on November 8, 1937 (R. 2), reasserting the six claims (for $1,153,022.72) which had been denied by this Court on jurisdictional grounds.

At the second trial of the case, the Court of Claims reexamined these six items in the light of arguments made by the Government on the merits when the case was first in this Court, and as a result disallowed three items ($935,334.24) in their entirety (R. 25, 26, 27), allowed one in full ($1,790.00) (R. 41), and allowed the other two ($215,898.48) in part ($16,598.30) (R. 38).

[2] On remand to the Court of Claims judgment was entered in the sum of $10,099.25 (R. 2, 21; 85 C. Cls. 699); this sum was intended to include the $490.20 which this Court had allowed on the $154,455.30 claim, and the three small items ($9,609.25) which the Government had not questioned in its petition for certiorari. These four items totalled $10,099.45; entry of judgment by the court for an amount falling $.20 short of this figure is attributable to an inadvertent error of petitioner in its motion for judgment on March 20, 1937, in the Court of Claims (R. 2).

Against the sum of these claims thus sustained ($18,388.30), the Government was allowed gratuity offets of $705,337.33 (R. 42) under the Act of August 12, 1935, 49 Stat. 571, 596. Since the offsets exceeded the amount due petitioner, the Court of Claims ordered the second amended petition dismissed (R. 39).

In the petition for certiorari and in its brief on the merits, the Seminole Nation challenges the correctness of the decision below on each of the five claims which were disallowed in whole or in part (Pet. 14–41; Br. 14–42) and as to numerous items which the court included in its list of gratuity offsets (Pet. 41–55; Br. 42–86). Petitioner's contentions concerning each claim and item of gratuity, the material treaty or statutory provisions, and the accounting details which underlie each are set forth and analyzed in the Argument.

## SUMMARY OF ARGUMENT

### I

The United States was bound by treaty to provide the Seminole Nation with $7,200 annually for ten years from 1857 to 1866, for the support of schools, agricultural assistance, and blacksmiths and shops. Congress regularly appropriated sufficient funds to discharge this obligation. $10,436.58 was spent for the purposes specified in the treaty; the balance was disbursed for the benefit of refugee Indians who had remained loyal to the United States during the Civil War and had on that account been driven from their homes. The act of the

Seminole Nation in joining the Confederacy during 1861 would have warranted a complete abrogation of the treaty by the United States. Diversion of the balance of the $72,000 from treaty purposes was therefore validly authorized by statutes enacted in the years 1862 to 1866. In any event, the diversions were subsequently ratified by the Seminole Nation in a treaty with the United States; and if the diversions were neither authorized nor ratified, amounts spent on loyal refugee Seminoles must be allowed as gratuity offsets under the Act of August 12, 1935.

II

Under other treaty provisions the United States was obligated to establish a $500,000 trust fund for the Seminoles and use the interest for per capita payments to members of the Nation. Sufficient annual appropriations were made by Congress, but in disbursement there was an underpayment of $92,051.28, and $62,500 was paid to the United States Indian Agent for the Seminole Nation instead of to the Seminoles directly. The Nation now asserts a claim for these sums. However, the Government made overpayments in five years, totalling $12,127.54. Payments of $66,422.64 were made to the tribal treasurer and creditors of the Seminoles during the years of alleged underpayment, pursuant to resolutions adopted by the Seminole governing body. The $62,500 payment to the Seminole Agent was authorized by statute, and the money was ultimately expended for proper

purposes. The Government should therefore receive a credit of $141,050.18 against petitioner's claim for $154,551.28 on this item, and the court below correctly reduced the amount of liability here to $13,501.10.

## III

By a later treaty the United States was bound to pay $2,500 interest annually on a $50,000 trust fund for Seminole schools. From 1867 to 1874 there was a total deficiency of $3,097.20 in payments. From 1875 to 1898 the installments, totalling $57,500, were paid to the tribal treasurer instead of being expended directly for school purposes. In 1907 a payment of $750 was made on this account to the Indian Agent. The Government concedes the underpayment of $3,097.20, found by the court below. However, the amounts paid to the Seminole treasurer discharged *pro tanto* the Government's obligation, since the treasurer was a proper person to receive the $57,500 and appears to have expended it in support of schools. The payment of $750 to the Seminole Agent was also authorized (see Point II). The United States, then, is liable to petitioner on this claim for only $3,097.20.

If the payments made by the United States here with respect to schools and in Point II with respect to per capita annuities did not discharge the Government's corresponding obligations, they should nevertheless be allowed as gratuity offsets under the statute of 1935.

IV

The Government's treaty obligation to construct suitable agency buildings at a cost not exceeding $10,000 has been fully discharged by the expenditure of $931.76 for the purpose in 1870 and 1872 and by the construction in 1873 of a building which the evidence indicates was paid for by the expenditure of $9,030.15 out of an appropriation of $10,000 made by Congress for the treaty purpose.

V

Petitioner contends here that varied treaty and statutory payments were made improperly by the United States to the Seminole treasurer from 1898 to 1907, because of the prohibition contained in section 19 of the Curtis Act. The Government, however, urges that section 19 applied only to payments for disbursement to individual Seminoles; both the language and legislative history of the statute require this construction. None of the payments here involved was for disbursement. Even if the interpretation contended for by petitioner be accepted, section 19 would not govern since the Curtis Act was immediately superseded by the Seminole agreement of 1897 (ratified July 1, 1898), the provisions of which are inconsistent with section 19. The consistent administrative practice from the enactment of the Curtis Act has regarded its provisions as not prohibiting the payments in question to be made to the tribal treasurer. In any

event, the Seminole Nation has no standing to complain of a violation of section 19 since it conferred no rights of action, and constituted only a direction to Government officers; further, the Seminole Nation may not complain of payments made at its request to the tribal treasurer, since the payments were made pursuant to resolutions of the Seminole General Council; and no injury to the tribe or to individual Seminoles as a result of the alleged mispayments is shown by petitioner. If the payments were not held to discharge the several obligations of the Government to which they refer, they would constitute gratuity offsets under the 1935 statute.

VI

The court below found that the United States has expended over $700,000 gratuitously for the benefit of the Seminole Nation, and that the Government was entitled to offset these amounts against the Seminole claims. Petitioner challenges numerous items among these allowed offsets. The Government suggests that it is unnecessary for this Court to examine the merits of petitioner's contentions concerning those expenditures: we have urged that the Court of Claims correctly determined the total liability of the United States to be $18,388.30, and petitioner admits that the Government has proper offsets considerably in excess of that figure. Accordingly, the judgment of the court below dismissing the petition could be

affirmed without consideration of the items of gratuity offset.

If, however, the Court should reverse the decision below on petitioner's affirmative claims (at the same time determining that the amounts expended by the United States in attempted satisfaction of the corresponding obligations are not allowable as gratuity offsets), it would still not be required presently to consider the offset items allowed below. In that event the case should be remanded to the Court of Claims to liquidate the Government's liability and to find and designate the precise gratuity expenditures to be offset. Such a procedure would be desirable since the exact items of gratuity expenditure exhausted to satisfy the present Seminole claims would stand ascertained for future suits and since this Court would thereby not be required now to pass on the merits of all the gratuity items regardless of the Government's need for them as offsets.

## VII

However, to provide for the contingency that the Court should find it necessary to examine the items of gratuity offset on this review, the Government in this Point discusses the findings of the Court of Claims concerning gratuity expenditures. As the items are very numerous they are detailed in the Argument, and no attempt to summarize them is made here.

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The general statute concerning offsets against Indian claims under which the Court of Claims allowed the offsets in the present case was patterned after similar provisions in earlier individual jurisdictional acts. Those provisions had been construed by the Court of Claims when Congress enacted the statute of 1935, and the judicial interpretations were called to the attention of Congress during its consideration of the general offset provision. Many of the items of gratuity expenditure here contested are entirely similar to those earlier allowed as offsets by the Court of Claims under the special jurisdictional statutes. We think also that the other items, with minor exceptions noted in the course of the Argument, were properly classed as gratuity offsets, since the sums in question were spent gratuitously by the United States for the benefit of the Seminoles.

## ARGUMENT

### I

### THE GOVERNMENT IS UNDER NO FURTHER LIABILITY ON ACCOUNT OF ITS PROMISE IN ARTICLE VIII OF THE TREATY OF 1856 TO PROVIDE THE SEMINOLE NATION WITH $7,200 ANNUALLY FOR TEN YEARS FOR THE SUPPORT OF SCHOOLS, FOR AGRICULTURAL ASSISTANCE, AND FOR SMITHS AND SMITH SHOPS

Item 1 (Fdg. 3, R. 11–12; Opinion, R. 21–23; Br. 14–19) is a claim for $61,563.42 based on the Government's promise to the Seminole Nation in

Article VIII of the Treaty of August 7, 1856, 11 Stat. 699,702—

> * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops * * *, said sums to be applied to these objects in such manner as the President shall direct.

During each of the ten years covered by this article (fiscal years 1858 to 1867, inclusive), Congress regularly made the necessary appropriations to discharge this obligation ($72,000.00 in all), but only $10,436.58 was actually expended for the purposes specified in the treaty (Fdg. 3, R. 11–12). The balance ($61,563.42) was disbursed by the United States prior to June 30, 1866, for the purpose of clothing and feeding refugee and destitute Indians who had been driven from their homes during the Civil War on account of their loyalty to the Union (Fdg. 3, R. 12). It is petitioner's contention that the Seminole Nation should recover the money thus diverted.

To this claim the Government interposes three defenses: (a) that the diversion was authorized by the Resolution of February 22, 1862, and by the Indian appropriation acts for the fiscal years 1863, 1864, 1865, and 1866; (b) that the diversion was ratified by the treaty of March 21, 1866, 14 Stat. 755, 759; and (c) that, if these defenses are

not sustained, the amount expended in feeding and clothing loyal Seminole refugees must be allowed as a gratuity offset under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596.

A. THE DIVERSION OF $61,563.42 FOR FEEDING AND CLOTHING LOYAL REFUGEE INDIANS WAS AUTHORIZED BY THE RESOLUTION OF FEBRUARY 22, 1862, AND BY THE INDIAN APPROPRIATION ACTS FOR THE FISCAL YEARS 1863–1866

1. The United States relies first upon the Resolution of February 22, 1862, 12 Stat. 614, which provides:

> That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

That Congress had power to authorize the diversion of these annual payments to other purposes seems clear under well-established principles of international law. The Seminole Nation had joined the Confederacy on August 1, 1861.[3] By reason of this hostile act Congress could have de-

[3] See preamble to Treaty of March 21, 1866, 14 Stat. 755.

cleared the Treaty of 1856 between the United States and the Nation to be at an end. See *Karnuth* v. *United States*, 279 U. S. 231, 236–237, 241; 2 Hyde, *International Law* (1922) 94.[4] *A fortiori* Congress could take appropriate steps to withhold the sinews of war from the disloyal tribes and to use the moneys for supporting individual Indians who remained loyal to the Union.[5]

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[4] It is noteworthy that the preamble to the Treaty of March 21, 1866, 14 Stat. 755 (reestablishing relations with the Seminoles), recites: "Whereas the Seminole nation made a treaty with the so-called confederate states, August 1st, 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States." See also Article IX of that Treaty which makes it clear that the United States, in reaffirming and reassuming certain prior treaty obligations, agreed to renew only those "payments of annuities accruing by force of said treaty stipulations, from and after the close of the present fiscal year [June 30, 1866]." See 2 Hyde, *op cit. supra* 95.

[5] That these considerations presented themselves to Congress when it authorized diversions of the treaty payments is evidenced by a statement of Senator Doolittle in debate on the Indian appropriation bill for the fiscal year 1863, which contained a proviso similar to the Resolution of February 22, 1862. He said (Cong. Globe, 37th Cong., 2d sess., pt. 3, p. 2125): "I have no doubt that in our relations with the Indian tribes they are under our Constitution to be regarded by us the same as foreign nations; at all events we treat with them as such. We can hold on to any money in our hands which is going to them as to a foreign nation or a nation distinct from ourselves. If for any reason we are satisfied that they have violated their treaty with us, and if they are at war with us, we can withhold that money; and more than all that, it is perfectly within our power to take the

There is no warrant for petitioner's suggestion (Br. 15, 18) that the Government is endeavoring to construct out of the events of the Civil War an excuse for breaches of treaty obligations which occurred prior to the war. Up to the time the Seminoles joined the Confederacy Congress had appropriated funds ($36,000.00 in all) to fulfill the Government's obligations through the fiscal year ending June 30, 1862.[6] It is true that not all of this money had been spent by August 1, 1861, when the Seminole Nation became allied with the Confederate States.[7] But the mere fact that there was an unexpended balance on hand at the outbreak of the war did not mean that the treaty had been breached. While under Article VIII the

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money which would go to them if they had remained loyal, and expend that money upon those who are loyal. I have no doubt about that, and that is the proposition of the Senator from Ohio."

[6] Acts of March 3, 1857, 11 Stat. 169, 175; May 5, 1858, 11 Stat. 273, 282; February 28, 1859, 11 Stat. 388, 398; June 19, 1860, 12 Stat. 44, 54; March 2, 1861, 12 Stat. 221, 230.

[7] The Court of Claims did not find how much the Government spent for treaty purposes in each year. It simply found that a total of $10,436.58 was expended for treaty purposes (R. 11), and that the balance of $61,563.42 was disbursed prior to June 30, 1866, for clothing and feeding loyal Indians. However, the report of the General Accounting Office, which was a part of the record in the lower court, shows (pp. 148–150) that $3,239.08 had been spent for treaty purposes up to August 1, 1861. The report also shows (pp. 150–151) that after the resumption of treaty obligations (see n. 4, p. 15, *supra*) $7,197.50 of the $7,200.00 appropriated for the fiscal year 1867 was spent for treaty purposes. These portions of the report are set out in the Appendix, pp. 62–63.

United States was to make a total of $7,200.00 available each year, the treaty contained no requirement that the money was to be spent within the year. It simply provided that the annuity was to be applied "in such manner as the President shall direct." Accordingly, it is submitted that there had been no breach of the treaty prior to the war. Upon the commencement of hostility between the United States and the Seminole Nation, any obligation of the Government to make payments from previous appropriations ceased, for, with respect to paying subsidies to the Seminoles during war, there could be no rational distinction between the sums agreed in the treaty to be made available before 1861 and those to be made available after.

From the language of the Resolution of February 22, 1862, it is not certain that the diversion of annuities payable in succeeding years was thereby authorized.* But a strong argument is presented for holding that it did in the fact that the resolution was not part of any particular appropriation act but was an independent statutory provision applicable to a situation which continued throughout the Civil War period and until treaty relations were fully resumed on July 1, 1866.

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*The terms of the resolution, set out at p. 14, *supra*, make apparent that diversion of annuities payable before 1862 was included in its scope.

2. However, whether the resolution just considered furnishes a total or only a partial defense to the United States against petitioner's claim of annuities for the years from 1858 to 1866 is not controlling in view of provisions contained in the regular appropriation acts for the fiscal years 1863 to 1866. For example, the following three provisos appear in the Indian appropriation act of July 5, 1862, c. 135, 12 Stat. 512, 528:

> * * * *Provided,* That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: *Provided, further,* That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. * * * *And provided, further,* That in cases where the tribal organization

> of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

This act conferred three distinct powers on the President: (1) he might suspend or postpone any appropriations theretofore or thereafter made in favor of tribes which were in a state of actual hostility to the Government; (2) he might expend, for the benefit of loyal refugee Indians, such part of the amount which had theretofore been appropriated and not expended and which was thereinbefore appropriated for the Seminoles and the other named tribes; and (3) he might, by proclamation, declare certain Indian treaties abrogated.

Petitioner urges (Br. 15–16) that the act could not become operative without action by the President pursuant to the first proviso, and since no such action is shown diversions under the second proviso were unauthorized.[9] We think, on the other hand, that the statute did not intend the execution of any formalities under the first pro-

[9] The Seminole Nation cites (Br. 15), in support of its contention that the President refused to act under the first proviso, Abel, *American Indian Under Reconstruction* (1925) 251–252, notes 496–497. This reference, however, shows only that President Lincoln declined to issue a proclamation pursuant to the third proviso declaring abrogated certain treaties with the Cherokees.

viso as a prerequisite to action by the President under the second, and that diversion of appropriated moneys pursuant to this latter proviso operated to suspend automatically the payment of corresponding amounts to the tribes.

Similar authority is to be found in the Indian appropriation acts for the fiscal years 1864, 1865, and 1866,[10] with the difference that those last three acts expressly authorize the diversion to be made by the Secretary of the Interior.[11] It is submitted that complete authority for the diversion of the $6[illegible]3.42 is found in the provisions of these four appropriation acts.[12]

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[10] Indian Appropriation Act of March 3, 1863, c. 99, sec. 3, 12 Stat. 774, 793; the Indian Appropriation Act of June 25, 1864, c. 148, sec. 2, 13 Stat. 161, 180; Act of March 3, 1865, c. 127, sec. 5, 13 Stat. 541, 562.

These statutes contain provisions equivalent to only the second proviso in the act of 1862.

[11] The actual diversions under all of the statutes were made by the Secretary of the Interior; the legality of this procedure with respect to the appropriation act of 1862 is not open to question since the acts of heads of executive departments are considered as the acts of the President. *Chicago, Mil. & St. P. Ry.* v. *United States*, 244 U. S. 351, 357; cf. *The Sac and Fox Indians*, 220 U. S. 481, 484; see *Hegler* v. *Faulkner*, 153 U. S. 109, 117.

[12] The Act of July 5, 1862, covered not only appropriations for the fiscal year 1863 but also covered all moneys theretofore appropriated and not expended. See n. 8, p. 17, *supra*. The other acts covered the fiscal years 1864 through 1866. The money appropriated for the fiscal year 1867 was expended for treaty purposes (except for a shortage of $2.50). See n. 7, p. 16, *supra*.

B. THE DIVERSION OF $61,563.42 FOR FEEDING AND CLOTHING LOYAL REFUGEE INDIANS WAS RATIFIED BY THE TREATY OF MARCH 21, 1866, 14 STAT. 755

Even if the expenditure of $61,563.42 from the Seminole appropriations in order to feed and clothe loyal refugee Indians was not authorized by the statutes already discussed, the diversion was ratified by the Seminole Nation in Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759:

> The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

The first sentence of this article, it will be noted, contains a general release by the Seminole Nation of all claims against the United States "for damages and losses of every kind growing out of the late rebellion," [13] and a specific release of all claims based on "expenditures by the United States of annuities in clothing and feeding refugee and destitute [Seminole and other] Indians * * * ." [14] The second sentence of the article

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[13] It has been shown at pp. 16–17, *supra*, that the United States had fulfilled its treaty obligations up to the time the Seminoles joined the Confederacy. Accordingly, there is no foundation for petitioner's contention (Br. 18) that the claims here involved were not for damages and losses growing out of the war, since their basis and cause, respectively, were the diversions.

[14] Although the treaty of 1856 did not denominate the annual provision of $7,200.00 here in question an "annuity", there is no reasonable doubt that this fixed annual sum was embraced in the term as used by the parties in the first sentence of Article VIII. *Cf. Peck* v. *Kinney*, 143 Fed. 76, 80 (C. C. A. 2d); *Bacon* v. *Commissioner*, 266 Mass. 547, 549; *Harland* v. *Damon's Estate*, 103 Vt. 519, 531. Nor do we understand petitioner to controvert this position. In fact, payments very similar to those provided for in Article VIII of the Treaty of 1856 have often been referred to in treaties and statutes by the term "annuity". *E. g.*, the following treaties: *Seminoles*, 1832, Article IV, 7 Stat. 368, 369 ("annuity for the support of a blacksmith"); *Creeks and Seminoles*, 1845, Article IV, 9 Stat. 821, 822 ("additional annuity of three thousand dollars for purposes of education"); *Choctaws*, 1825, Article II, 7 Stat. 234, 235 ($6,000.00 to be annually applied for 20 years "to the support of schools," "said annuity" thereafter to be invested in stocks, etc.); *Oto and Missouri Tribes*, 1833, Article III, 7 Stat. 429, 430 (continuation of $500.00 annuity "for instruments for agricultural

states that "the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States." In return the Government promised that it would not use tribal annuities after June 30, 1866, for feeding and clothing refugee Indians, other than Seminoles.

Petitioner argues (Br. 17–18) that Article VIII does not cover the diversions in question because they were made "from funds of the United States, and not from funds of the Seminole Nation." In view of the broad purpose of the Treaty of 1866 to adjust all differences between the United States and the Seminoles which arose out of the Civil War, a construction would seem unjustifiably narrow which limited "diversions of annuities heretofore made from the funds of the Seminole Nation" to only the diversions of per capita interest payments made by the Treasury pursuant to another provision of the treaty of 1856 and excluded diversions of the annuities here involved. In any event, the releases contained in the first sentence of Article VIII of the Treaty of 1866 are effective independently of the ratification contained in the second sentence, and the second release in the first sentence is not qualified by any

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purposes"); statutes: Act of August 18, 1856, 11 Stat. 65, 66 (annuity for instruction of Blackfeet in "agricultural and mechanical pursuits"); *id.* at 69 ("permanent annuity for support of light-horsemen"); *id.* at 76 ("permanent annuity for educational purposes"); *id.* at 77 ("annuity for beneficial objects").

requirement that the annuities there referred to be "funds of the Seminole Nation."

C. THE AMOUNT EXPENDED IN CLOTHING AND FEEDING REFUGEE SEMINOLE INDIANS IS IN ANY EVENT A GRATUITY OFFSET UNDER THE 1935 INDIAN CLAIMS OFFSET STATUTE

As a third defense we wish to point out that if this Court holds that the Government is liable to the Seminole Nation for the $61,563.42 diverted during the Civil War because the expenditure of $61,563.42 on loyal Indians was neither authorized nor ratified and consequently did not discharge the Government's obligation under the 1856 Treaty then the United States in this case is entitled to a gratuity offset under section 2 of title I of the Act of August 12, 1935, 49 Stat. 571, 596, for the amount actually spent in feeding and clothing refugee Seminole Indians.[15]

## II

PETITIONER'S CLAIM FOR $154,551.28 FOR NONPAYMENT AND MISPAYMENT OF INTEREST ACCRUING FROM THE $500,000 TRUST FUND ESTABLISHED UNDER ARTICLE VIII OF THE TREATY OF 1856 WAS RIGHTLY REDUCED TO $13,501.10

Item 2 (Fdg. 5, R. 12–13; Opinion, R. 23–25; Br. 19–22) is a claim for $154,551.28 based on another provision in Article VIII of the Treaty of

[15] Since the court below held that the Government was not liable, it had no occasion to consider whether any part of the $61,563.42 was a gratuity offset. Therefore, the present findings do not disclose the exact amount spent on Seminoles as distinguished from other refugees. To make such a determination a remand would be necessary.

August 7, 1856, 11 Stat. 699, 702, namely, the Government's promise to establish a $500,000.00 trust fund (originally two funds of $250,000.00 each), the annual interest therefrom ($25,000.00) to be used for per capita payments to members of the Seminole Nation. Although Congress appropriated $25,000.00 annually for each of the fiscal years in controversy (1867–1898, 1907–1909),[16] the findings show that the Government did in fact fail to make direct per capita disbursements of a portion of the money appropriated in 1867–1874, 1876, and 1879, the underpayments for those ten years amounting to $92,051.28 (R. 13), and that one-half of the appropriation in 1907 and the entire appropriation in 1908 and 1909 ($62,500.00 in all), instead of being paid directly to the Seminoles, was paid to the United States Indian Agent for the Seminole Nation (R. 13). On the basis of these underpayments and alleged mispayments petitioner contends that $154,551.28 is still due the tribe.

Against this claim of $154,551.28 the Government has interposed three set-offs, consisting of (a) overpayments of $12,127.54 made in 1875, 1877,

[16] Alleged mispayments to the tribal treasurer during the years 1898 to 1907 are not included in item 2. They constitute, instead, a part of item 5 (*infra*, pp. 35–64), a general claim for the recovery of all moneys ($864,702.58) paid to the tribal treasurer from 1898 to 1907, it being petitioner's contention that payments to that officer during those years were interdicted by section 19 of the Curtis Act of June 28, 1898, 30 Stat. 495.

1880, 1882, and 1883; (b) payments of $66,422.64 which were made pursuant to requests of the Seminole General Council during the period from 1870 to 1874; and (c) the payments of $62,500.00 made to the United States Indian Agent in 1907, 1908, and 1909. These set-offs were allowed by the court below, and petitioner's claim was thus reduced from $154,551.28 to $13,501.10 (R. 23–25, 42):

A. THE OVERPAYMENTS ARE DEDUCTIBLE

The findings show (R. 13) that the direct per capita payments exceeded $25,000.00 in five different years (1875, 1877, 1880, 1882, and 1883). These overpayments totalling $12,127.54 should, of course, be deducted. *Wisconsin Central R. R.* v. *United States*, 164 U. S. 190, 212; *Florida Central and Peninsula R. R.* v. *United States*, 43 C. Cls. 572, 580–582. Petitioner does not contend otherwise (Br. 19–22), apparently realizing that these overpayments, if not allowed as set-offs under general accounting principles, must be allowed as gratuity offsets under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 596.

B. PAYMENTS MADE PURSUANT TO RESOLUTIONS OF THE TRIBAL COUNCIL ARE ALSO DEDUCTIBLE

The findings show that during the years from 1870 to 1874 interest payments totalling $66,422.64 from the fund in question were made directly to

the tribal treasurer ($37,500.00)[17] and to designated creditors ($28,922.64) pursuant to requests of the Seminole General Council (R. 13, 44–50). Direct per capita payments for those years were in a correspondingly reduced amount (R. 13). Since the Seminole Nation at that time was a semiautonomous political entity which conducted its affairs through a tribal council possessing authority to enter into treaties and other agreements with the United States, and since the payments were made at the request of the tribal council, the tribe is not entitled now to receive these payments a second time. Cf. *Duncan* v. *Jaudon*, 15 Wall. 165, 171–172; *Magee* v. *United States*, 282 U. S. 432, 434; *Pope* v. *Farnsworth*, 146 Mass. 339, 343; *Lannin* v. *Buckley*, 256 Mass. 78, 82; *Matter of Niles*, 113 N. Y. 547, 559; see Perry, *Trusts and Trustees* (7th ed.) sec. 849; American Law Institute, *Restatement of the Law of Trusts* (1935) sec. 216. While it is true that Article VIII of the 1856 Treaty establishing the $500,000.00 trust fund provided that these payments should be made per capita for the benefit of each individual Indian,[18] the agreement

[17] The fact that the fiscal officer's accounts were disallowed with respect to these payments does not, of course, bear on the correctness of the finding of the court below that the $37,500.00 was paid to the tribal treasurer.

[18] It is shown in point V (*infra*, pp. 45–47), that the provision for per capita payments was by mutual agreement of the parties changed in 1879 so as to provide for payments to the treasurer of the Seminole Nation.

was one between the United States and the tribe and not one between the United States and the individual members of the tribe. Since the tribe received the money the Seminole Nation cannot now complain merely because the payments were not made directly to the individual members of the tribe. *The Sac and Fox Indians,* 220 U. S. 481, 484; *Blackfeather* v. *United States,* 190 U. S. 368, 377.

If, however, the Government is not entitled to a credit of $66,422.44 for the payments which were made directly to the tribal treasurer and to designated creditors pursuant to these requests of the Seminole General Council, it would seem clear that the amount so paid should be allowed as a gratuity offset under the 1935 act.[19]

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[19] Petitioner anticipates this defense and argues (Br. 21, n. 1) that no offset should be allowed because the 1935 act provides "That funds appropriated and expended from tribal funds shall not be construed as gratuities." We think this proviso has no application here because the moneys in question were appropriated "out of any money in the [United States] Treasury not otherwise appropriated." See, *e. g.*, Act of April 10, 1869, 16 Stat. 13, 30; Act of July 15, 1870, 16 Stat. 335, 350; Act of March 3, 1871, 16 Stat. 544, 560. The proviso in the 1935 act refers to the frequent and familiar Congressional practice of making appropriations "out of any moneys belonging to [a specified] tribe in the United States Treasury or deposited in any bank or held by any official under the jurisdiction of the Secretary of the Interior * * *." See, *e. g.*, section 19 of the Act of May 18, 1916, c. 125, 39 Stat. 123, 147; section 18 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 580.

C. PAYMENTS DIRECTLY TO THE UNITED STATES INDIAN AGENT ARE LIKEWISE DEDUCTIBLE

The findings show that during the years from 1907 to 1909 interest payments of $62,500.00 were made directly to the United States Indian Agent for the use of the Seminole Nation (R. 13). The Government should receive credit for such payments, because Congress in section 11 of the Act of April 26, 1906, 34 Stat. 137, 141, expressly directed—

> That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. * * *

Accordingly, after 1906 the interest on the $500,000.00 trust fund was collected by the United States Indian Agent under the authority of this

act. It was subsequently expended by him for the benefit of the tribe.[20]

If this Court should hold that the $62,500.00 paid to the Indian Agent for the Seminole Nation and by him expended for the benefit of the tribe did not discharge the Government's treaty obligation for the two and one-half years in question, it must in any event be allowed as a gratuity offset under the 1935 act.

From the foregoing analysis of the interest payments made under the $500,000.00 trust fund provided for by the treaty of 1856, it will be seen that as against the claimed deficiency of $154,551.28 the Government is entitled to credits of $12,127.54 for overpayments, $66,422.64 for payments made directly to the tribal treasurer, and $62,500.00 for payments made directly to the Indian Agent for the Seminole Nation ($141,050.18 in all). It follows that petitioner's claim for $154,551.28 was correctly reduced to $13,501.10, the amount allowed by the court below (R. 23–25, 42).

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[20] There is no formal finding by the Court of Claims that the United States Indian Agent actually disbursed the $62,500.00 which was paid to him in 1907, 1908, and 1909. But the report of the General Accounting Office, which was filed as part of the record of this case in the court below, shows that these moneys were in fact expended by the Indian Agent for "per capita payments" and for "administrative expenses Seminole National Government" (pp. 308–310). See Appendix, pp. 64–65.

## III

### PETITIONER'S CLAIM FOR $61,347.20 FOR NONPAYMENT AND MISPAYMENT OF INTEREST ACCRUING FROM THE $50,000 TRUST FUND ESTABLISHED UNDER ARTICLE III OF THE TREATY OF 1866 WAS RIGHTLY REDUCED TO $3,097.20

Item 3 (Fdg. 6, R. 13–14; Opinion, R. 25–26; Br. 22–23) is a claim for $61,347.20 based on Article III of the Treaty of March 21, 1866, 14 Stat. 755, in which the United States agreed to establish a $50,000.00 trust fund for the Seminole Nation and pay thereon annual interest of 5 percent ($2,500.00) to be used for "the support of schools." Petitioner contends (Br. 22–23) (a) that during the period from 1867 to 1874 the Government discharged only partially the annual obligation created by the treaty, the total deficiency amounting to $3,097.20; (b) that during the period from 1875 to 1898 twenty-three annual instalments of interest ($57,500.00 in all), instead of being expended directly by the United States for the support of schools, were paid to the tribal treasurer;[21] and (c) that in 1907 a payment of $750.00 was similarly made to the United States Indian Agent.

#### A. UNDERPAYMENTS

The court below found, and the parties agree, that of the $20,000.00 appropriated from 1867 to

[21] Alleged mispayments to the tribal treasurer during the years 1898 to 1907 are not included in this item as they constitute a part of item 5. (See n. 16, p. 25, *supra*.)

1874, only $16,902.80 was disbursed for the support of schools, and that accordingly $3,097.20 is now due the Seminoles (R. 14, 26).

B. PAYMENTS MADE TO TRIBAL TREASURER

The Seminoles are not entitled to recover the $57,500.00 which was actually paid to their tribal treasurer from 1875 to 1897 (R. 14). During that period the Seminoles had their own government and conducted their own schools.[22] Under these circumstances the tribal treasurer was an entirely appropriate person to receive the interest payment for the support of schools. There was no requirement that the money be expended directly by the United States. And the evidence shows "that the tribal treasurer disbursed annually not less than $2,500.00 in excess of amounts it was otherwise obligated to expend for the maintenance of schools" (R. 25–26). It follows that the United States is not liable to the Seminoles for the $57,500.00 which it paid to the tribal treasurer as interest on the trust fund established pursuant to Article III of the 1866 Treaty.

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[22] See Annual Report of the Department of the Interior for the fiscal year ending June 30, 1899, 56th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 94; Report for the fiscal year ending June 30, 1900, 56 Cong., 2nd sess., H. Doc. No. 5, Indian Affairs, p. 86; Report for the fiscal year ending June 30, 1901, 57th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 135. See also *Chickasaw Nation* v. *United States*, 87 C. Cls. 91, 93–94.

Again the Government urges that if the $57,500.00 which was paid to the Seminole tribal treasurer did not to that extent discharge the Government's obligation under Article III of the 1866 Treaty, then the sum thus paid is a gratuity offset which should be allowed under the 1935 act.

C. PAYMENT MADE TO INDIAN AGENT

Nor are the Seminoles entitled to recover the $750.00 interest payment made from this fund to the United States Indian Agent in 1907, because that payment was fully authorized by section 11 of the 1906 act (*supra*, pages 29–30), and was expended for their benefit. See note 20, *supra*, page 30. But if it be held that the $750.00 payment did not constitute a discharge *pro tanto* of the Government's obligation under the 1866 Treaty, the sum thus paid must be deemed a gratuity offset to be added to the $705,337.33 allowed by the court below.

## IV

THE GOVERNMENT'S OBLIGATION UNDER ARTICLE VI OF THE TREATY OF 1866 TO ESTABLISH "SUITABLE AGENCY BUILDINGS" FOR THE SEMINOLES HAS BEEN FULLY DISCHARGED

Item 4 (Fdg. 7, R. 14; Opinion, R. 26–27; Br. 23–25) is a claim based on the Government's promise in Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758, to construct, "at an expense not exceeding Ten Thousand ($10,000.00)

Dollars, suitable agency buildings" on the Seminole reservation. Petitioner construes this as an agreement to spend *at least* $10,000.00. It concedes (Br. 24) that in 1870 and 1872 the Government expended $931.76 for this purpose, and contends that $9,068.24 is still owing.

However, in addition to the $931.76, which petitioner admits was expended from general appropriations, the Court of Claims found (R. 14–15) that Congress by the Act of May 18, 1872, 17 Stat. 122, 132, specifically appropriated $10,000.00 to fulfill its treaty obligation and that $9,030.15 of this appropriation was expended for some purpose (inasmuch as only $969.85 was later returned to surplus). The court also found (R. 15) that "an agency building was erected on the Seminole Reservation in the year 1873."[23] The Court of Claims accordingly concluded that there had been no violation of the treaty provision, petitioner having made no claim that the building erected

[23] In this connection the court referred in its opinion (R. 26–27) to the report of the Commissioner of Indian Affairs for 1873, pp. 211–212. Petitioner contends (Br. 24) that this report merely shows that some sort of building "was in the process of *being* constructed," and not that it was actually constructed. The pertinent paragraph of the report is as follows:

"Since the agency building was commenced, the 10th of July, some dissatisfaction has been produced, because all who made application did not obtain employment, and those who did obtain it appear sorry that their labor is *about ended* there, *the building being now nearly finished.*" [Italics supplied.]

was not "suitable" (R. 26–27). Inasmuch as Article VI provided merely for the erection of "suitable agency buildings" at an expense "not exceeding Ten Thousand ($10,000.00) Dollars" it follows that the expenditure by the Government of $931.76, referred to earlier, and of the funds required for the construction in 1873 (in all probability the $9,030.15 from the special appropriation) completely discharged its liability under this provision of the 1866 Treaty.

## V

THE UNITED STATES IS NOT LIABLE TO THE SEMINOLE NATION FOR THE $864,702.58 WHICH WAS PAID TO THE TRIBAL TREASURER AT THE REQUEST OF THE TRIBAL COUNCIL DURING THE PERIOD FROM JULY 1, 1898, TO JUNE 30, 1907

Item 5 (Fdg. 8, R. 15–16; Opinion, R. 27–30; Br. 25–42) is a claim for all moneys paid to its tribal treasurer after the passage of the Curtis Act of June 28, 1898, 30 Stat. 495, 502. The payments involved were made during the fiscal years from 1899 to 1907, and totalled $864,702.58. Of this amount, $212,500.00 was paid to fulfill the obligation of the United States under Article VIII of the Treaty of 1856 with the Seminole Nation, providing for per capita payments of $25,000.00 per annum; $29,750.00 was to fulfil the obligation under Article III of the Treaty of 1866, providing for the payment of interest at 5 percent on $50,000.00, for school purposes, and 5 percent

interest on $20,000.00, for the support of the Seminole government; $622,156.87 was to carry out the provisions of section 12 of the Act of March 2, 1889, 25 Stat. 980, 1004, for the payment of interest at 5 percent per annum on $1,500,000.00, "to be paid semi-annually to the treasurer of said nation." The remainder, $295.71, is "proceeds of labor" (R. 15). It is petitioner's contention that section 19 of the Curtis Act forbade the making of these payments directly to the tribe or its officers.

To this claim the Government makes the following answer: (a) the payments were properly made to the tribal treasurer; (b) even if the payments to the tribal treasurer were in violation of section 19, the tribe has no standing to complain; and (c) payments made to the tribal treasurer and by him expended for the benefit of the tribe, if not a discharge of the Government's legal obligations, are in any event gratuity offsets allowable under the 1935 act.

### A. THE $864,702.58 WAS PROPERLY PAID TO THE TRIBAL TREASURER

1. *Section 19 of the Curtis Act prohibits only payments to tribal officers which are "for disbursement", i. e., payments to be distributed by them to members of the tribe.*—That section 19 was not intended to cover all payments to the Five Civilized Tribes is shown by the language of the act, by its legislative history, and by statutes *in pari materia.*

a. *Language.*—Section 19 of the Curtis Act of June 28, 1898, 30 Stat. 495, 502, contains the following prohibition:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

The words of the opening clause restrict its operation to those payments which are made to a tribal government or officer as an agent "for disbursement". The phrase "on any account whatever" which appears in the clause does not relax this restriction on the application of section 19 but merely recognizes that every payment "for disbursement" is included, regardless of the contract which gave rise to the obligation or the account to which the payment is charged. The restriction of the first clause is reflected in the express provisions of the second. It is there recognized that the first clause has barred the customary method of making "payments of all sums to members of said tribes", and that a way out of the impasse must be furnished. Accordingly, the second clause

directs that "payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him". The remaining clauses of the section deal with a problem arising out of a particular category of payments for disbursement to members of tribes, namely, "per capita payments". And it is provided that these payments "shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

If section 19 were to be construed as prohibiting all payments to the tribe or its officers, then the later clauses of the section would be inadequate to dispose of the problems raised by the first clause: the first clause would withhold all moneys of every kind from the tribal government or its officers, while the succeeding clauses would make provision only for payments to members or per capita payments. The section makes no provision for the payment of the expenses of maintaining and conducting the tribal government.

Therefore, section 19 should be deemed a prohibition against payments of money to the tribal treasurer only where such payments are to be distributed by him to members of the tribe. In those situations the payments are to be made directly to members of the tribe by an appointee of the Secretary of the Interior; but money earmarked for educational or tribal purposes and money intended for any purposes the tribe might

designate could still be paid to the tribal treasurer notwithstanding the prohibition contained in section 19 of the Curtis Act.

b. *Legislative History.*—Section 19, in the bill as originally introduced in the House (H. R. 8581, 55th Cong., 31 Cong. Rec. 3869), was worded as follows:

> * * * that no payment of any moneys, on any account whatever, be made to any of the tribal governments or to any officer thereof for disbursement, but payments of *all expenses incurred in transacting their business and of* all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [Italics supplied.]

Thus the bill as originally drafted prohibited not only the payment of any moneys to tribal officers for disbursement to members but also the payment of moneys to cover the expenses of the tribal governments. The prohibition against payments of moneys to cover expenses incurred in transacting the business of the tribal governments was stricken before the bill was enacted. The striking of this clause would seem a plain expression by Congress of its intention that the tribal officers should retain the right to disburse

their funds for the expenses of their respective tribal governments.

c. *Statutes* in Pari Materia.—Contemporaneously with the adoption of section 19 and as a part of the same act (sections 29 and 30), agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks were ratified containing the following stipulations, respectively:

> That all per capita payments hereafter made to the members of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary [30 Stat. 512].
>
> * * * All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to the Secretary [30 Stat. 518].

These two provisions are *in pari materia* with section 19. Like section 19, they deal only with payments to members of the tribes.[24]

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[24] See also the Indian Appropriation Act of June 10, 1896 (fiscal year 1897), 29 Stat. 321, 336, which contained the following provision: "That any sums of money *hereafter to be paid per capita to individual Indians* shall be paid to said Indians by an officer of the Government designated by the

It is also significant that the following provision of the Act of June 7, 1897, 30 Stat. 62, 84,

> That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: * * *.

was entirely repealed as to the Seminoles by the terms of the agreement with that tribe ratified July 1, 1898 (30 Stat. 567, 569), and was repealed as to tribal laws appropriating money for the regular and necessary expenses of the tribal government by the agreements with the Choctaws and Chickasaws (30 Stat. 495, 513), and with the Muscogees or Creeks (30 Stat. 495, 518) ratified by the Act of June 28, 1898. These repeals manifested the intent of Congress to restore to these tribes the full control which they theretofore exercised over the expenses of maintaining and conducting the tribal governments.

In view of the foregoing, it is submitted that in holding (R. 29–30) that section 19 related only to funds which were to be distributed to members of

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Secretary of the Interior." [Italics supplied.] An attempt to insert an almost identical provision in the Indian Appropriation Bill for the fiscal year 1898 was defeated on a point of order. 29 Cong. Rec. 1261.

the tribe, the Court of Claims rightly followed its prior decision in *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 391–393, certiorari denied, 312 U. S. 695.

2. *The payments in question were not "for disbursement" to members of the tribe and therefore were not covered by the prohibition in section 19.*—As stated above, the record shows that the $864,702.58 paid to the tribal treasurer during the fiscal years 1899 to 1907 was made up of the following items: (a) $29,750.00 was interest on the trust funds established for "the support of schools" and "for the support of the Seminole government" under Article III of the Treaty of 1866; (b) $622,156.87 was interest on the general fund of $1,500,000.00 set up under the Act of March 2, 1889, 25 Stat. 980, 1004; (c) $295.71 was "Indian moneys, proceeds of labor";[25] and (d) $212,500.00 was interest on the $500,000.00 trust fund set up under Article VIII of the Treaty of 1856. It is the Government's contention that none

[25] The Act of March 2, 1887, 24 Stat. 449, 463, provides:

"That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of 'Indian moneys, proceeds of labor,' for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

of these funds were for disbursement to individual members of the tribe, and that in consequence section 19 of the Curtis Act was inapplicable.

a. The item in relation to which section 19 is most plainly not relevant is the interest on the $70,000.00 trust established by Article III of the Treaty of March 21, 1866; the article provided that:

> * * * fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

This treaty states, without the slightest ambiguity, that the purposes of this trust were to give $2,500.00 annually for "the support of schools" and $1,000.00 annually "for the support of the Seminole government." The money was not intended for individual Indians.

b. The interest payments from the trust of $1,500,000.00 established by section 12 of the Act of March 2, 1889, 25 Stat. 980, 1004, are also outside the scope of section 19. The terms of the trust are as follows:

> One million five hundred thousand dollars to remain in the Treasury of the United

> States to the credit of said nation of Indians [the Seminoles] and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-annually to the treasurer of said nation, * * *

There are no restrictions respecting the uses to which the money thus paid to the tribal treasurer should be put, and as a result the money could be used for any purpose which the tribal council might designate.

c. Likewise, the payment to the tribal treasurer of the $295.71 listed as "Indian moneys, proceeds of labor" did not contravene section 19, in view of the provision of the Act of March 2, 1887, 24 Stat. 449, 463, set out earlier in this brief in note 25, page 42.

d. While the Court of Claims held that none of the foregoing payments was covered by section 19, it rejected without discussion (R. 30) the Government's contention that the interest ($212,500.00)[26] from the trust fund established by Article VIII of the Treaty of 1856 was not for per capita distribution.[26]

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[26] The Court of Claims based its refusal to allow recovery by the tribe of the $212,500.00 on the ground that petitioner had no standing to complain of the violation of the Curtis Act. The Government believes that this holding was sound and in point B, pp. 57–64, *infra*, advances the argument as a defense not only to the claim for $212,500.00 but to the entire claim of $864,702.58 involved in Item 5.

The Government concedes that that trust originally provided that the interest should be paid per capita for distribution to members of the Seminole Tribe. In Article VIII the Government promised the Seminoles:

> * * * to invest for them the sum of two hundred and fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the United tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *

However, almost twenty years before the Curtis Act the character and purposes of this interest payment were by agreement changed into a payment for the benefit of the Seminole Nation itself, like the interest on the $1,500,000.00 statutory trust.

In the Act of April 15, 1874, 18 Stat. 29, Congress provided:

> That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now

> due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided,* That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further,* That the consent of said tribe to such expenditures and payment shall be first obtained.

This statute was not a unilateral mandate which attempted to change the annuities from per capita disbursements to payments to the Nation's tribal treasurer; it merely authorized the Commissioner of Indian Affairs, with the consent of the Secretary of the Interior and the President, to make an offer "to pay such annuities or any part thereof into the treasury of the Seminole nation". The new method of payment authorized was to become effective only if "the consent of

said tribe to such expenditures and payment shall be first obtained."

Such an offer was made and accepted in the manner provided by the Act of April 15, 1874. By the act of the Seminole legislature (also called council), on April 2, 1879, the tribe consented that all annuities then due or thereafter to become due from the United States under the provision of the eighth article of the Treaty of August 7, 1856, should be paid into the treasury of the Seminole Nation, to be used as the tribal council should provide. See opinion of Assistant Comptroller Mitchell, dated August 23, 1898, Appendix, pp. 39–54. Thus there was a consensual conversion of the Government's obligation on the trust from payments of interest for the benefit of individual Indians to payments for the benefit of the tribe. To that extent the Treaty of 1856 was modified, so that when the Curtis Act was enacted it did not affect this trust.

3. *If section 19, properly construed, applied to all payments to the tribal governments, then it was inconsistent with and has been superseded by subsequent special agreements with each of the Five Tribes.*—In 1893 the Dawes Commission undertook to negotiate agreements with the Five Civilized Tribes, looking toward the termination of the tribal governments and the distribution in severalty of tribal property. Section 16 of the Act of March 3, 1893, 27 Stat. 612, 645. However, after three years of attempts to reach agreements

with the Indians, Congress despaired of achieving voluntary action. Cohen, *Handbook of Federal Indian Law* (1941) 431. The determination of Congress to proceed without the consent of the tribes found expression in the Act of June , 1897, 30 Stat. 62, 84, and in the first 28 sections of the Curtis Act of June 28, 1898, 30 Stat. 495. The legislative history of the latter act makes it clear that Congress contemplated that many of the provisions in the first 28 sections would be superseded if and when the tribes ratified agreements negotiated by the Dawes Commission. 31 Cong. Rec. 5588.[27] Two such proposed agreements, one with

[27] For example, Senator Jones, of the Committee on Indian Affairs, who had charge of the bill on the floor of the Senate (31 Cong. Rec. 1493–1494), made the following explanation as to the relationship between the agreement set out in section 29 and the 28 sections which preceded it (31 Cong. Rec. 5588): "Mr. President, the bill, beginning with section 28 [now 29], provides for the submission of the agreement which has heretofore been made between the Dawes Commission and the Indian tribes and for a settlement of all of these difficulties. The bill before us, on page 28, looks to a disposition of all of these questions by the Government of the United States. The Indians have not ratified this agreement. Their agents made the agreement with the Dawes Commission, and this provision of section 28 [29] is that in case they do ratify the agreement, then the terms of the agreement shall supersede the others and shall be enforced; but, if it is not ratified, then the provisions of the bill before section 28 [29] shall become the law and be operative in that Territory. That reconciles the apparent discrepancy pointed out by the Senator from Alabama."

the Choctaws and Chickasaws (section 29) and one with the Creeks (section 30), were appended to the Curtis Act and were to be effective when approved at a tribal election.

A similar agreement, already ratified by the Seminoles, was approved by Congress on the same day the Curtis Act was passed, and was signed by the President on July 1, 1898 (30 Stat. 567). The act ratifying the Seminole agreement provided for the repeal of "all laws and parts of laws inconsistent therewith" (30 Stat. 567, 569). It is clear from this provision and from the history of the Curtis Act that Congress intended the special agreement with the Seminoles to supersede the inconsistent provisions in the first 28 sections of the Curtis Act.

If section 19 be construed as prohibiting *all* payments to the tribal officers, including the payment of the expenses of maintaining and conducting the tribal governments (as distinguished from payments for disbursement to members of the tribe), then the section is plainly inconsistent with the Seminole agreement. That agreement, the provisions of which are set forth in the Appendix at pp. 21–27, shows that the intent and purpose of Congress and the Seminole Nation was to continue the existence of the tribal government with all of its machinery until the affairs of the tribe were

concluded and the tribe was ready to go out of existence.[28]

In passing it should be noted that following the Seminole agreement and prior to the end of 1902, similar agreements were entered into with the other four tribes.[29] Like the Seminole agreement these agreements are inconsistent with and supersede section 19 of the Curtis Act if section 19 be construed as forbidding all payments to tribal officers. 30 Stat. 505, 512 (quoted page 40, *supra*); 30 Stat. 514, 518 (quoted page 40, *supra*); 31 Stat. 870, 872; 32 Stat. 725, 727.

4. *The inapplicability of section 19 to the payments in question is supported by the administrative construction, which in turn has been implicitly approved by Congress.*—After enactment of the

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[28] Section 8 of the Act of March 3, 1903, 32 Stat. 982, 1008 provided that the tribal government of the Seminole Nation should not continue longer than March 4, 1906. However, the Resolution of March 2, 1906, 34 Stat. 822, continued the governments of the Five Civilized Tribes "until all property of such tribes * * * shall be distributed among the individual members". The next month a comprehensive law was passed which indefinitely continued the existence of tribal governments but made their actions subject to the approval of the President. Act of April 26, 1906, 34 Stat. 137, 148.

[29] The Atoka agreement, which is set forth in section 29 of the Curtis Act, was subsequently ratified by the Choctaws and Chickasaws; the agreement with the Creeks in section 30 of the Curtis Act was rejected by them and a new agreement was ratified by the Act of March 1, 1901, 31 Stat. 861, 32 Stat. 1971; an agreement with the Cherokees was ratified by the Act of July 1, 1902, 32 Stat. 716.

Curtis Act and approval of the Seminole agreement on July 1, 1898, the Secretary of the Interior sought an opinion from the Assistant Attorney General for the Department of the Interior concerning the effect of section 19 of the Curtis Act. Assistant Attorney General Van Devanter gave an opinion dated July 12, 1898,[20] which advised that (1) section 19 of the Curtis Act was applicable to the Seminoles, although they were not specifically mentioned; (2) there was no inconsistency between that section and the provision of the Seminole agreement which required that *after the extinguishment of the tribal government* payments to Seminoles should be made by a person appointed by the Secretary of the Interior,[21] and (3) in any event the method of disbursement contemplated by that provision of the Seminole

[20] The opinion is referred to and quoted in part in 82 C. Cls. 135, 157–158.

[21] The provision in question is as follows (30 Stat. 567, 568):

"All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient *after allotment and extinguishment of tribal government*, * * *. Such payment shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements." [Italics supplied.]

agreement was the same as the method prescribed by section 19.

When Mr. Van Devanter learned that the real question which the Secretary of the Interior had intended to propound related to the meaning of section 19, and more particularly the applicability of its first clause to the making of interest payments from the trust funds here involved, he withdrew his opinion, stating:

> The matter involved in this reference and in your original request for an opinion, is of very difficult solution and requires a careful examination of the Seminole treaties and of the legislation by Congress relating to that tribe. The real question intended to be presented is not simply whether section 19 of the act of June 28, 1898, applies to the Seminole tribe, but also whether that section is limited in its application to payments to members or per capita payments, or whether it includes and is applicable to the payment of the expenses of maintaining and conducting the tribal government.
>
> * * * * *
>
> The Comptroller of the Treasury seems to be the final arbiter of questions of the character here involved. An opinion by me upon the question presented would not be conclusive, and since the statute provides the means of obtaining an authoritative decision from the Comptroller of the Treasury, I respectfully suggest that my opinion of the 12th ultimo be withdrawn and that

> the matter be presented to the Comptroller of the Treasury for his decision.
>
> I have personally prepared, and herewith submit for your consideration, a form of letter to the Comptroller which, it is believed, presents the real question involved and all matters necessary to its proper solution.[32]

The letter which he prepared summarizes the Government's entire argument with respect to the applicability of section 19 to the payments in question: Mr. Van Devanter first points out that the question presented is whether moneys appropriated to pay interest on the trust funds created by Article VIII of the Treaty of 1856, Article III of the Treaty of 1866, and the Act of March 2, 1889, may be disbursed to the treasurer of the Seminole Nation. He then states that the Department of the Interior desires to disburse the money in that manner unless section 19 of the Curtis Act prohibits such payments. In support of the Department's position he argued (1) that section 19 applied only to payments for disbursement to members of the tribe; (2) that none of the payments in question came within that prohibition, and (3) that, if section 19 applied to *all* payments,

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[32] The quotation in the text is taken from a letter which Assistant Attorney General Van Devanter wrote to the Secretary of the Interior on August 15, 1898. This letter was introduced in evidence in the Court of Claims. The full text is printed in the Appendix at pages 37–39.

it was inconsistent with and superseded by the Seminole agreement approved July 1, 1898.[33]

After receiving this letter, Assistant Comptroller of the Treasury Mitchell ruled:

> From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal government of its privilege and duty of disbursing its own funds prior to the time of the extinguishment of its tribal government, which extinguishment is evidently contemplated in the near future; therefore, I am of opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished.[34]

This contemporaneous ruling as to disbursements under these trust funds is entitled to great weight since it was given by an official whose decision was authorized to "govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." Sec-

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[33] This letter of Mr. Van Devanter, dated August 16, 1898, is set out in full in Assistant Comptroller Mitchell's opinion of August 23, 1898, Appendix, pp. 39–53.

[34] Opinion dated August 23, 1898; the full text is printed in the Appendix, pp. 39, 53–54. Cf. opinion dated August 30, 1898, 5 Comp. Dec. 93, ruling with respect to payments to the Creek Indians that section 19 of the Curtis Act would be superseded if the Creeks ratified the proposed agreement set forth in section 30 of that Act. 30 Stat. 495, 514–519.

tion 8 of the Act of July 31, 1894, 28 Stat. 162, 208.

The administrative construction was specifically drawn to the attention of Congress. In the Annual Report of the Department of the Interior for the fiscal year ending June 30, 1899, 56th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 197, the Secretary of the Interior transmitted to Congress the report of United States Indian Agent J. Blair Shoenfelt pointing out that—

> By reason of this treaty [the Seminole Agreement of 1897], which was afterwards ratified by Congress, the Seminoles are not under the provisions of the Curtis Act, and the Indian agent does not receive or disburse any of their moneys, it being done by the tribal officers * * *.

Two years later, a like report of the same agent, transmitted to Congress as part of the Annual Report of the Department of the Interior for the fiscal year ending June 30, 1901, 57th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 231, noted that—

> By reason of this agreement, which was afterwards ratified by Congress, the Seminoles are not under the provisions of the act of Congress of June 28, 1898, and the Indian agent does not receive or disburse any of their moneys, it being done by tribal officers.

Again, the next year, the report of the same agent indicated that "no revenues or royalties of any character have been collected by me for the benefit of the Seminole Nation during the fiscal year ended June 30, 1902." Annual Report of the Department of the Interior for the fiscal year ending June 30, 1902, 57th Cong., 2nd sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 206.

In the face of these reports Congress continued to make appropriations for the payment of interest on the Seminole trusts. Act of July 1, 1898, 30 Stat. 571, 580; Act of March 1, 1899, 30 Stat. 924, 933; Act of May 31, 1900, 31 Stat. 221, 230; Act of March 3, 1901, 31 Stat. 1058, 1067–1068; Act of May 27 1902, 32 Stat. 245, 253; Act of March 3, 1903, 32 Stat. 982, 989; Act of April 21, 1904, 33 Stat. 189, 198–199; Act of March 3, 1905, 33 Stat. 1048, 1054. Thus an administrative construction of the Curtis Act, made in 1898, shortly after enactment of the statute in question and approval of the Seminole agreement, was implicitly ratified by Congress in subsequent years, and has stood unchallenged until this law suit. We submit that the present case falls plainly within the doctrine stated by this Court in *Alaska Steamship Company* v. *United States*, 290 U. S. 256, 262:

> Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to * * *. That construction must be accepted and applied

> by the courts when, as in the present case, it has received Congressional approval, implicit in the annual appropriations over a period of thirty-five years, * * *.

See also *Brooks* v. *Dewar,* 213 U. S. 354, 360.

In view of the foregoing, we submit that the payment of $864,702.58 to the tribal treasurer during the fiscal years 1899 to 1907[35] was not prohibited by section 19 of the Curtis Act.

B. IF THE PAYMENT OF THE $864,702.58 TO THE TRIBAL TREASURER WAS IN VIOLATION OF SECTION 19 OF THE CURTIS ACT, THE PETITIONER HAS NO STANDING TO COMPLAIN

Assuming, *arguendo,* that section 19 of the Curtis Act was violated by making the payments in question to the tribal treasurer, we think it clear that petitioner cannot complain, for the following reasons: (1) section 19 gave no right of action to the Seminole Nation; (2) the tribe may not complain of payments made at its request, and (3) there is no showing that the payments to the tribal treasurer resulted in injury to petitioner or even to individual Indians.

1. Section 19 was not a contractual agreement with the tribe or its members. It was merely a direction to the fiscal officers of the United States, which Congress could change at will. *The Sac*

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[35] As a result of the Act of April 26, 1906, 34 Stat. 137, 141, and the construction placed upon it by Attorney General Bonaparte in his opinion of August 19, 1907 (see Appendix, pp. 58–61), payments to the tribal treasurer stopped in 1907. Cf. Opinion of Comptroller Tracewell, dated October 19, 1906, Appendix, pp. 55–58.

*and Fox Indians,* 220 U. S. 481, 483–484, 489–490. In continuing to make payments to the tribal treasurer after 1898, the officers of the Government violated no agreement with the Seminoles; they merely continued to make payments to the very officer who had been receiving them prior to 1898. Any violation of section 19 was, as the court below held (R. 30), a matter between Congress and the administrative officers of the Government, and not one between the United States and the Seminoles.

Since petitioner seeks (Br. 40–41) to distinguish the *Sac and Fox* case, *supra,* it is appropriate to examine it in some detail. There the Government had promised, by the Treaty of October 11, 1842, 7 Stat. 596, "to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars." The larger part of this tribe was together in the West, first in Kansas and later in Oklahoma. A band, however, settled in Iowa. Nonetheless, at the outset the Government paid the entire annuity to those who were on the reservation in the West. With this or other similar situations in mind, Congress provided in section 3 of the Indian Appropriation Act of August 30, 1852, 10 Stat. 41, 56,—

> That no part of the appropriations herein made, or that may hereafter be made, for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe,

> or part of a tribe; but shall in every case, be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of a tribe, *per capita*, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President. * * *

Even after the enactment of this statute, which directed that the officers of the United States make payment due to members of an Indian tribe "directly to the Indian or Indians themselves to whom it shall be due", the Government continued to make payment solely to those who were on the reservation. The Iowa band contended that this was a violation of the 1852 Act, of which they could complain, and accordingly filed their first claim on that basis. This Court denied the claim. Among other reasons for this result, Mr. Justice Holmes stated (220 U. S. 483-484):

> The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379, 387. The Government did not deal with individuals but with tribes. *Blackfeather* v. *United States*, 190 U. S. 368, 377. See *Fleming* v. *McCurtain*, 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes.

It is plain that this quotation gives two reasons. One is that where money has been promised to Indians and the promise has been performed in accordance with the agreement but in conflict with a statute giving "a direction to agents of the United States" how to make the disbursement, the Indians have no right to complain. This reason, which is the one upon which we rely here, is buttressed by a relevant citation, *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 387. The second reason given in the quotation is that even if the conduct were a wrong to the Indians, the wrong was one of which only the tribe as a whole, and not a fraction of it, could complain. For this principle the citation given by Mr. Justice Holmes is *Blackfeather* v. *United States,* 190 U. S. 368, 377.

In the *Sac and Fox* case, the second claim advanced by the Iowa tribe was based on the Indian Appropriation Act of March 2, 1867, 14 Stat. 492, 507. This act, after making the appropriation of the annuity due the Sac and Fox Indians, contained the proviso—

> That the band of Sacs and Foxes of the Mississippi now in Tamar county, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

The Iowa band alleged that the Government failed to distribute in accordance with this proviso. In

denying this claim this Court remarked (220 U. S. 485):

> This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it.

The third claim presented by the Iowa band was founded on the Indian Appropriation Act of July 4, 1884, 23 Stat. 76, 85, where, after an appropriation for interest payable under the Treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them from treaty appropriations—.

> * * * their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further,* That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior.

The Iowa band alleged that the apportionment had been improper and they had not received a fair share of the per capita payments. In rejecting this claim the Court made the following comment (220 U. S. 486), which amplifies the rule already stated:

> But here for a third time we are dealing with a statute, not with a treaty. There is no intimation of an intent to change the terms of the treaties by which the contracts were made not with individuals but with the tribes. The statute neither changed nor

> conferred rights. It simply directed the Secretary of the Interior how the contracts of the United States should be performed.

Summarizing the Court's decision rejecting all three claims, Mr. Justice Holmes said (220 U. S. 489–490):

> The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867.

Here again the quoted passage announces two propositions, of which the first is directly pertinent to our contention: Where money has been promised to a tribe of Indians, and the promise has been performed in accordance with the agreement but in conflict with a statute giving instructions, with respect to disbursements, to officers of the United States, the legal rights of the Indians have not been infringed.

This proposition and this quotation apply directly to the case at bar. The treaties here "gave

rights only to the tribe, not to the members." These treaties, as mutually modified, were followed. The Curtis Act "did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones."

2. Moreover, the record shows that the payments now complained of were made to the tribal treasurer at the request of the Seminole General Council (R. 15). At that time, and until the Act of April 26, 1906, 34 Stat. 137, took effect, the Seminole Nation conducted its affairs and its relations with the United States through its tribal council, the general governing body of the tribe. Therefore, when the officers of the tribe made a demand that moneys be paid into its tribal treasury, notwithstanding the Curtis Act, that demand was accepted and acted upon as a demand of the tribe. Since the payments were made to the tribal treasurer pursuant to the request of the duly constituted governing body of the tribe, petitioner is not entitled to receive the interest payments a second time. Cf. *Duncan* v. *Jaudon,* 15 Wall. 165, 171–172; *Magee* v. *United States,* 282 U. S. 432, 434; *Pope* v. *Farnsworth,* 146 Mass. 339, 343; *Lannin* v. *Buckley,* 256 Mass. 78, 82; *Matter of Niles,* 113 N. Y. 547, 559; see Perry, *Trusts and Trustees* (7th ed.), sec. 849; American Law Institute, *Restatement of the Law of Trusts* (1935) sec. 216.

3. In any event the record fails to show that the payments to the tribal treasurer resulted in

damage to petitioner or even to individual Indians. In order to be entitled to recover the $864,702.58, which it claims, petitioner would not only have to show that section 19 was violated but also that such violation resulted in actual damage in that amount. Petitioner has not sustained this burden. What evidence there is indicates that the money was properly expended by the tribal officers. The court found that the books of the tribal treasurer, though crude, tend to show that $815,059.71 of these moneys were expended in the years 1899 to 1906 (as distinguished from the *fiscal* years 1899 to 1907) for schools, per capita payments, salaries of officers, the blacksmith, the physician, etc. (R. 15–16.)

C. PAYMENTS MADE TO THE TRIBAL TREASURER AND BY HIM EXPENDED FOR THE BENEFIT OF THE TRIBE ARE IN ANY EVENT GRATUITY OFFSETS ALLOWABLE UNDER THE 1935 ACT

If it be held that the payments made to the tribal treasurer did not discharge the Government's legal obligations to the tribe, it seems clear that these payments, since they were made at the tribe's request and for its benefit, are gratuity offsets under the 1935 act. In other words, if the payments to the tribal treasurer did not discharge the Government's legal obligations, then the tribe received $864,702.58 which it ought not to have received at all, and which should therefore be added to the Government's gratuity offsets.

## VI

### IF THE CONTENTIONS MADE IN THE FOREGOING POINTS ARE CORRECT, THE ALLEGED ERRORS IN THE ALLOWANCE OF GRATUITY OFFSETS NEED NOT BE CONSIDERED

The Court of Claims found (R. 16–20) that the United States has gratuitously spent more than $700,000.00 for the benefit of the Seminole Nation. And it held (R. 42) that under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596, the Government was entitled to offset these gratuitous expenditures against the amount found to be due the Indians. Petitioner argues (Br. 42–86) that the court committed numerous errors with respect to the 114 items which it included in the list of offsets. The Government suggests that this Court may find it unnecessary to review these findings and to examine the details of each expenditure.

In the preceding sections of this brief we have urged that the court below correctly determined (R. 42) the Government's total liability to be only $18,388.30.[36] If the Court agrees, then it need not go further because petitioner admits that the Government has offsets totalling at least $35,539.91.[37]

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[36] This total is made up of the following: $13,501.10 from item 2, p. 26, *supra;* $3,097.20 from item 3, p. 32, *supra;* and $1,790.00 which was allowed on petitioner's claim of $20,000.00 based on Article IX of the Treaty of 1856 (R. 3, 12, 23, 39–41).

[37] This total is made up of the following items which, in the court below, petitioner conceded to be proper offsets: $31,083.79 spent for subsistence of Seminoles (Fdg. 9; R. 16,

Accordingly, the judgment dismissing the petition could be affirmed without further consideration.

It should be noted that when the United States requested findings as to gratuity expenditures its liability had not been fixed and petitioner was asserting claims in excess of $1,000,000.00 (R. 2–7). In consequence, the Government pleaded all available offsets. But after the court below decided that petitioner was entitled to recover only $18,388.30, it could simply have employed undisputed offsets in a like amount to cancel out the Government's liability; it was not required to find the full extent of the Government's offsets. See *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 361–362, 377–378 (1933); *Chippewa Indians of Minnesota* v. *United States*, 87 C. Cls. 1, 38–39 (1938); *Wichita Indians* v. *United States*, 89 C. Cls. 378, 423 (1939). *Cf. Duwamish*, et al. *Indians* v. *United States*, 79

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30); $2,500.00 spent for clothing (Fdg. 11; R. 17, 33); $425.68, medical attention (Fdg. 12; R. 17, 35); $5.42, clothing; $149.90, expenses of delegates; $35.00, livestock; $1,124.12, medical attention; $216.00, provisions (Fdg. 13; R. 18, 37).

In addition, petitioner apparently does not challenge the decision below insofar as it holds the following items totalling $10,713.79 are proper offsets: $610.00, clothing (Fdg. 11; R. 17, 32); $168.80, presents (Fdg. 11; R. 17, 33); $4,357.57, provisions (Fdg. 11; R. 17, 33); $171.89, education (Fdg. 12; R. 17, 34); $4,309.00, expenses of delegates (Fdg. 12; R. 17, 34); $345.00, feed of livestock (Fdg. 12; R. 11, 34); $659.12, provisions (Fdg. 12; R. 17, 35); and $92.41, which is 3.72% of the items "Agricultural implements and equipment", "Feed and care of livestock", "Livestock", "Medical attention", and "Pay and expenses of farmers", in Finding 17, R. 19.

C. Cls. 530, 611–612 (1934); *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 405 (1940). By the same token this Court, if it affirms as to the amount of liability, need not examine the correctness of the findings with respect to the disputed offsets.

Even if this Court should reverse the decision below it would have no occasion to consider the disputed offset items at this time. In the event of a decision in favor of petitioner with respect to one or more of its claims (accompanied by a determination that the corresponding amounts expended by the United States in attempted satisfaction of its obligations are not proper gratuity offsets), the case should be remanded in order that the Court of Claims could (1) fix the amount of the Government's liability,[38] and (2)

[38] It is not believed that a decision against the Government on any of the five items would give rise to a liquidated liability: If the decision below were reversed as to item 1 the Court of Claims would still have to determine the damage to the Seminoles resulting from the Government's failure fully to discharge its promise to provide funds for the support of schools, agricultural assistance, and blacksmiths. If its decision were reversed as to item 2, 3, or 5, the Court of Claims would still have to determine the damage to petitioner resulting from the payment of annuities to the tribal treasurer or United States Indian Agent. Similarly, a reversal as to item 4 would leave for future determination the damage suffered by the Seminoles as the result of being forced to transact business with a government agent who occupied a building costing only $931.76 rather than $10,000.00.

In the absence of a specific statutory provision, the United States is not liable for interest on money claims. *Smyth* v.

find and designate the precise gratuitous expenditures to be offset against that liability. Unless this second step is taken confusion and uncertainty are likely to arise in subsequent suits by the Seminole Nation.[39] Gratuity offsets resemble a fund in bank which may be drawn upon by the Government in successive Indian claims cases until exhausted; it could not be contended that the present judgment of $18,388.30 wipes out all gratuity offsets which the United States may have against the Seminole Nation. Since offsets may be needed in future cases it becomes important to know precisely which items have been employed to extinguish the liability in the instant case. The alternative to designating the particular offset items which have been used would be to treat as binding in subsequent suits between the present parties the findings of the Court of Claims that the Government has made gratuitous expenditures for the Seminoles in excess of $700,000.00. The disadvantage of that treatment is made evident when it is considered that as a result this Court would be called upon to examine offsets which might never be needed and which, even if disapproved, would not change the result reached by the Court of Claims.

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*United States*, 302 U. S. 329, 353. The basic jurisdictional act in the present case makes no provision for the payment of interest to the Seminole Nation. Act of May 20, 1924, c. 162, 43 Stat. 133–134.

[39] See the Seminole Nation's petition for certiorari in No. 830, this Term, pp. 13, 14, 20.

However, to provide for the eventuality that the Court should deem it material now to consider whether the Government has offsets in addition to those conceded by petitioner, the following section of this brief is presented to deal with the findings in question.

## VII

### GRATUITY OFFSETS

Title I of the second deficiency appropriation Act of August 12, 1935, 49 Stat. 571, 596, 25 U. S. C. sec. 475a, contains the following provision with reference to gratuity offsets:

> SEC. 2. In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * * *Provided,* That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; * * * *Provided further,* That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *

It is necessary in construing this section of the 1935 act, to consider its legislative background.

Beginning in 1901, Congress adopted the practice of including in special jurisdictional acts for the hearing of Indian claims a provision directing the Court of Claims to offset amounts gratuitously expended by the United States for the Indians.[40] However, a few acts were passed without such a provision.[41] When Congress reviewed the situa-

[40] Act of March 3, 1901, 31 Stat. 1058, 1078 (Sisseton and Wahpeton Sioux); Act of March 3, 1909, 35 Stat. 781, 789 (Utes); Act of April 11, 1916, 39 Stat. 47 (Sisseton and Wahpeton Sioux); Act of May 26, 1920, 41 Stat. 623, 624 (Klamaths, etc.); Act of February 6, 1921, 41 Stat. 1097 (Osages); Act of March 13, 1924, 43 Stat. 21 (Blackfeet); Act of June 4, 1924, 43 Stat. 366 (Wichitas); Act of June 7, 1924, 43 Stat. 644 (Stockbridges); Act of January 9, 1925, 43 Stat. 729 (Poncas); Act of February 12, 1925, 43 Stat. 886; Act of May 14, 1926, 44 Stat. 555 (Chippewas); Act of July 2, 1926, 44 Stat. 801 (Pottawatomies); Act of July 3, 1926, 44 Stat. 807 (Crows); Act of March 2, 1927, 44 Stat. 1263 (Assiniboines); Act of March 3, 1927, 44 Stat. 1349 (Shoshones); Act of December 17, 1928, 45 Stat. 1027 (Winnebagos); Act of February 20, 1929, 45 Stat. 1249 (Nez Perces); Act of February 23, 1929, 45 Stat. 1256 (Coos, Bays); Act of February 23, 1929, 45 Stat. 1258 (Kansas Indians); Act of February 28, 1929, 45 Stat. 1407 (Northwestern Shoshones); Act of December 23, 1930, 46 Stat. 1033 (Warm Springs Indians); Act of March 3, 1931, 46 Stat. 1487 (Pillager Chippewas); Act of April 25, 1932, 47 Stat. 137 (Eastern and Western Cherokees); Act of June 19, 1935, 49 Stat. 388 (Alaska Indians); see also Act of March 4, 1917, 39 Stat. 1195, 1196 (Medawakanton and Wahpakoota Sioux); Act of February 11, 1920, 41 Stat. 404, 405 (Fort Berthold Indians); Act of June 3, 1920, 41 Stat. 738 (Sioux).

[41] Act of July 1, 1902, 32 Stat. 716, 726 (Cherokees); Act of February 15, 1909, 35 Stat. 619 (Chippewas); Act of June 22, 1910, 36 Stat. 580 (Omahas); Act of June 25, 1910, 36

tion in 1935, it found that Indian claims then pending totalled almost $3,000,000,000.00, about one-third of which were being litigated under jurisdictional acts which did not permit the offsetting of gratuitous expenditures. H. Rep. No. 1261, 74th Cong., 1st sess. Believing that gratuities should be deducted in all cases, Congress enacted the above-quoted provision, making it applicable not only to all suits thereafter filed, but to suits then pending in the Court of Claims which had not been tried or submitted.

The fact that Congress, in special jurisdictional acts prior to 1935, had provided for the offsetting of "gratuities" is important. As a result of these statutes the Court of Claims not only had had occasion to define gratuities in general terms as expenditures by the United States for the benefit of the Indians "in addition to appropriations and disbursements made in satisfaction of treaty or other obligations",[42] but it also had recognized that certain specific types of expenditures were

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Stat. 829 (Chippewas); Act of April 28, 1920, 41 Stat. 585 (Iowas); Act of March 19, 1924, 43 Stat. 27 (Cherokees); Act of May 20, 1924, 43 Stat. 133 (Seminoles); Act of May 24, 1924, 43 Stat. 139 (Creeks); Act of June 7, 1924, 43 Stat. 537 (Choctaws and Chickasaws); Act of March 3, 1925, 43 Stat. 1133 (Kansas Indians) (amended in 1929 to permit gratuity set-offs, 45 Stat. 1258).

[42] *Blackfeet* et al, *Nations* v. *United States*, 81 C. Cls. 101, 115, 140–141; *Crow Nation* v. *United States*, 81 C. Cls. 238, 268 (March 4, 1935).

gratuities."[43] Congress must be presumed to have known (and in fact was actually advised[44]) of those decisions when it directed the Court of Claims in the 1935 act to deduct gratuitous expenditures in all subsequent Indian cases. Cf. *Hecht* v. *Malley*, 265 U. S. 144, 153; *Latimer* v. *United States*, 223 U. S. 501, 504; *Sessions* v. *Romadka*, 145 U. S. 29, 42. In the course of our discussion of the items which are questioned in the present case we will have occasion to refer to the decisions of the Court of Claims prior to 1935 in which moneys expended for identical items were allowed as offsets.

1. *Finding 10* (*R. 16–17*; *Opinion, R. 30–31; Br. 42–49*).—Petitioner contends that the Court of

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[43] *Kansas or Kaw Indians* v. *United States*, 80 C. Cls. 264, 295–296, 324–325 (1934); *Blackfeet* et al, *Nations* v. *United States*, 81 C. Cls. 101, 115, 140–141 (April 8, 1935). Laurence F. Schmeckebier, in a monograph on *The Office of Indian Affairs* (The Brookings Institution, 1927), divides appropriations for the Indian service into five general classes; (1) treaty stipulations; (2) gratuities; (3) tribal funds; (4) reimbursable, and (5) indefinite appropriation of reservation receipts (p. 509). A gratuity appropriation is defined as an appropriation "not based on any specific treaty or agreement, but in recognition of the general duty of the Government toward the Indians, to improve their social, physical, or economical condition" (p. 510). This monograph also contains a table showing the specific types of appropriations which are classed as gratuity appropriations (pp. 518–519). This table is reproduced in the Appendix at pp. 67–68.

[44] See Hearings before the Subcommittee of the Senate Committee on Appropriations, H. R. 8554, 74th Cong., 1st sess., pp. 106–107.

Claims erred in holding that the United States was entitled to an offset of $165,847.17 on account of the purchase of land by the United States for gift to the Seminoles.

Pursuant to Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, the United States granted to petitioner a tract, situated between two streams, which was bounded on the east by the western boundary of the territory of the Creek Nation (at that time undetermined) and on the west by a line to be drawn at such a distance from the eastern boundary that the tract would embrace 200,000 acres. In the fall and winter of 1866, before the boundaries were located, the Seminoles moved to what was assumed to be the treaty land (R. 72). In 1868 one Rankin purported to survey the eastern boundary, *i. e.*, the dividing line between the Seminole and Creek territories. It appeared that some of the Seminoles had settled east of Rankin's line; after his survey they moved west of that line (R. 72). However, Rankin's survey was not approved, and in 1871 a survey made by Bardwell put the eastern boundary seven miles west of Rankin's line. Bardwell's survey was approved by the Secretary of the Interior in 1872. Territory east of the Bardwell line and consequently belonging to the Creeks was then occupied by the Seminoles, who had made substantial improvements thereon. Sen. Ex. Doc. No. 75, 47th Cong., 1st sess., pp. 5–6 (1882).

In order that the Seminoles might retain the Creek lands they had improved, Congress author-

ized the Secretary of the Interior to negotiate with the Creeks for the relinquishment of these lands. Act of March 3, 1873, 17 Stat. 626. On February 14, 1881, the Secretary entered into an agreement with the Creeks whereby the latter ceded to the United States land east of the Bardwell line, the agreement providing that the eastern boundary thereof should be drawn so that the ceded tract would aggregate 175,000 acres. See *Creek Nation* v. *United States*, 93 C. Cls. 561, 566.[45] The United States paid the Creeks $175,000. Act of August 5, 1882, c. 390, 22 Stat. 257, 265. The tract became a part of the Seminole reservation and was disposed of either by allotment to the members of the tribe or by sale for account of the tribe (R. 16).

The Court of Claims arrived at the amount of offset as follows: It found that the United States paid the Creeks $177,397.71 (R. 16).[46] It assumed

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[45] The eastern boundary of these lands was drawn in 1888. It may be assumed that, as thus delineated, the tract comprised more than 175,000 acres. Whether the area was 177,397.71 acres (see R. 16, 30), or, as petitioner asserts (Br. 47) 176,198.99 acres, is immaterial in this case. The Creeks have sued the United States to recover compensation for the excess over 175,000 acres, but their petition was dismissed on the ground that the Creeks had intended to convey the whole tract for the consideration of $175,000 and because cession of the whole was ratified by them in an agreement of January 19, 1889, Act of March 1, 1889, c. 317, 25 Stat. 757. *Creek Nation* v. *United States*, 93 C. Cls. 561.

[46] Actually, the amount paid was $175,000, as is apparent from *Creek Nation* v. *United States*, *supra*, and the appropriation act of 1882.

upon the admission o the Government that the western boundary of the lands granted the Seminoles under the 1866 treaty had been so located in a Government-approved survey made in 1871 by Robbins that the tract contained only 188,449.46 acres, or 11,550.54 acres less than the 200,000 acres stipulated in the treaty (R. 31).[47] The Court then deducted 11,550.54 acres (shortage) from 177,397.71 acres and, pricing the difference at $1.00 per acre, arrived at $165,847.17 as the amount of the offset (R. 31).

We think that the amount of the offset was miscalculated. The gratuitous expenditure was $175,000.00 and not, as the Court of Claims found, $177,397.71. Further, we think that nothing should have been deducted from the gratuitous expenditure on account of a supposed shortage in or diminution of the lands covered by the 1866 treaty (see Br. 47).[48] Accordingly the gratuitous ex-

[47] The United States subsequently disposed of the land lying to the west of the Robbins line by patenting it in parcels to individuals of the Pottawatomie Tribe of Indians and to white settlers under the homestead laws. See Record, *Seminole Nation* v. *United States*, No. 830, this Term, p. 7.

[48] The Court of Claims made no finding that less than 200,000 acres was included within the boundary lines fixed by the United States. The question of such a possible shortage or diminution has been raised in another suit by the Seminoles to recover just compensation for the alleged taking by the Government of a strip of land west of the Robbins line. However, the Court of Claims did not there decide the existence or extent of deficiency, but dismissed the suit on the ground that the 175,000-acre grant more than compen-

penditure amounted to $175,000.00 and not $165,847.17.

Unquestionably the $175,000.00 was gratuitously spent. Petitioner's argument to the contrary rests upon a mere assertion (Br. 42) that the expenditure was made to satisfy the Government's "liability" to compensate the Seminoles for improvements they made upon the lands.

The assertion is groundless. Liability would exist only if the Government had failed to fulfill some obligation imposed upon it by the 1866 Treaty, thereby causing damage to the Seminole Nation. But that treaty did not require the United States to remove the Seminoles to the ceded lands or, in advance of their arrival, to survey the boundaries in order that the Seminoles should not settle outside them. As a result, settlement of the Seminoles upon Creek lands did not constitute a treaty violation by the United States.

Petitioner does not contend otherwise. Rather it asserts (Br. 43, 44, 47–48) that after the treaty was made and after the Seminoles removed to

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sated the Seminoles for any deficiency that might exist. On December 30, 1941, the Seminoles filed a petition for certiorari. *Seminole Nation* v. *United States*, No. 830, this Term. The Government there acquiesced in the granting of the petition, and is of opinion that the judgment of the Court of Claims should be reversed and the cause remanded with direction to determine the extent, if any, of the deficiency and award damages or compensation to petitioner if any be found due.

their supposed reservation, government agents promised that the United States would protect them in whatever improvements they might make upon the lands. However, as the Seminoles themselves recognized (R. 73), the men to whom they talked committed the Government only to the extent of their authority to do so, and it is not argued—and, of course, could not be—that any of them were empowered to treat with the Indians and make promises binding upon the United States. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 494; *United States* v. *North American Co.*, 253 U. S. 330, 333. Cf. *Pawnee Indians* v. *United States*, 56 C. Cls. 1, 9, 13.

This is not to say that the Government was not justified in purchasing these lands and giving them to the Seminoles. But such a consideration does not transmute the expenditure for this purchase from a gratuity into the satisfaction of a liability. See *The Sac and Fox Indians*, 220 U. S. 481, 489; *Laughlin* v. *United States*, 44 C. Cls. 224, 241. It is plain that the Seminoles were *given* an additional 175,000 acres with the result that their reservation was nearly doubled in size.[49]

[49] The Commissioner of Indian Affairs recommended to the Secretary of the Interior "that the agreement made in this city February 14, 1881, by the Creek Nation of Indians, ceding one hundred and seventy-five thousand acres of land in Indian Territory to the United States, being the land in question, for the sum of one hundred and seventy-five thousand dollars, be laid before Congress for ratification, and that that body be requested to make the necessary appropria-

In this connection, the Government invites the attention of the Court to congressional documents much stressed by petitioner (Br. 48). Sen. Ex. Doc. No. 75, 47th Cong., 1st sess. (1882); Sen. Ex. Doc. No. 126, 51st Cong., 1st sess. (1890). The first of these documents recommended the appropriation by Congress of the $175,000.00 in question. It contains no suggestion that the Government was obliged to buy the lands for the Seminoles. The second document recommended that the Secretary of the Interior be authorized to negotiate with the Creeks for the purchase for the Seminoles of an additional 25,000 acres which had also been improved by the latter in the mistaken belief they were part of the 1866 grant. But if the authorization had been obtained, the Seminoles would have been required to pay the purchase price.[50] As the

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tion to carry the same into effect; and that said lands be set apart for the use of the Seminole Nation of Indians, to be held by the same title as they now hold their land under the treaty of March 21, 1866, *whenever said Seminoles shall have relinquished to the United States in lieu thereof one hundred and seventy-five thousand acres of land from the western portion of their reserve in Indian Territary ceded to them by the treaty of 1866, and when said relinquishment shall have been approved by the Secretary of the Interior and recorded in the Office of Indian Affairs.*" [Italics supplied.] Sen. Ex. Doc. No. 75, 47th Cong., 1st sess., p. 2 (1882).

[50] A letter of transmittal from the President to Congress summarizes the proposed legislation as follows: "I transmit herewith a communication * * * from the Secretary of the Interior, and accompanying correspondence in the matter of the request of the Seminole Nation of Indians for

Commissioner of Indian Affairs stated to the Secretary of the Interior concerning this proposal: "The lands within the Creek Nation, upon which the Seminoles are now located, should unquestionably be purchased, but I do not think the United States is under any obligation to pay for the same." Sen. Ex. Doc. No. 126, 51st Cong., 1st sess., p. 5.[21] Equally the United States had been

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negotiations with the Creek Nation of Indians for the purchase of an additional quantity of land, being about 25,000 acres for the use of the Seminoles. The request is based upon the fact that former purchases did not embrace all of the lands upon which the Seminoles have made improvements, and which by the corrected survey were given to the Creeks. *The money to be paid for these lands is to be reimbursed the Government by the Seminoles.*" [Italics supplied.] Sen. Ex. Doc. No. 126, 51st Cong., 1st sess. p. 1 (1890).

[21] The Commissioner said (p. 4): "In a memorial dated February 12, 1890, the Seminole delegates state that at the time the 175,000 acres of land were purchased it was believed that quantity would cover all the lands occupied by the Seminoles, but that it was subsequently discovered that a large number of them were located and had improved farms on about 25,000 acres of Creek lands, not included in the said purchase, which lands they had continuously occupied since the ratification of the Treaty of 1866, or soon thereafter. In view of this fact they request the Secretary to open negotiations with the Creek Nation for the cession and relinquishment to the United States of the said 25,000 acres. They state that the homes and improvements of the Seminoles are worth vastly more than the lands upon which they are situated will cost; and that it is not the fault of the Seminoles that they were located upon Creek lands, nor that the negotiations under the Act of 1873 [17 Stat. 626, p. 74, *supra*] did not embrace all their improvements, they not having been consulted when said negotiations were con-

under no obligation to pay for the 175,000 acres bought in 1882, and the $175,000.00 expended for the purchase was a gratuity. Accordingly, petitioner cannot complain of the allowance of an offset in the amount of $165,847.17 (R. 39).

2. *Finding 11 (R. 17; Opinion, R. 31–34; Br. 53–61).*—Petitioner apparently concedes (see note 37, page 65, *supra*) that the items "Clothing", "Education", "Presents", and "Provisions and other rations" listed in Finding 11 were properly allowed by the Court of Claims. The items "Agency buildings and repairs" and "Expenses of delegates" were not allowed below (R. 32, 33), and need not be considered here (cf. Br. 54). This leaves in dispute the following six items: "Pay of Indian agents", "Miscellaneous agency expenses", "Fuel, light, and water", "Pay of interpreters", "Pay of miscellaneous employees", and "Transportation, etc. of supplies".

Prior to the enactment of the 1935 statute the Court of Claims had twice held that sums expended for the six purposes listed above were gratuity offsets. *Kansas or Kaw Indians* v. *United States,* 80 C. Cls. 264, 295–296, 324–325 (1934); *Blackfeet* et al. *Nations* v. *United States;* 81 C. Cls. 101, 137–138 (April 8, 1935).[52] These decisions and the

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cluded. * * * The lands within the Creek Nation, upon which the Seminoles are now located, should unquestionably be purchased, but I do not think that the United States is under any obligation to pay for the same."

[52] For decisions by the Court of Claims to the same effect subsequent to approval of the act, see *Shoshone Tribe* v.

offsets there allowed were specifically called to the attention of Congress. Hearings, S. Committee on Appropriations (Subcommittee), H. R. 8554, 74th Cong., 1st sess., p. 107.[83] In fact, Senator Thomas proposed an amendment which would have prevented the Government from offsetting these and similar items. See *id.* at 32. Congress, however, adopted the language which it had used in the earlier special jurisdictional acts, then already construed by the Court of Claims. The gloss thus

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*United States*, 82 C. Cls. 23, 55–59, 93–94 (December 2, 1935), 85 C. Cls. 331, 349–352, 357–358 (1937); *Choctaw & Chickasaw Nations* v. *United States*, 88 C. Cls. 271, 283 (1939); *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97, 121–123, 136–137 (1940); *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 347–357, 403–405 (1940), certiorari denied 312 U. S. 695. Cf. Schmeckebier, *The Office of Indian Affairs* (1927) 518–519; Appendix, pp. 67–68.

[83] The following table is reproduced from p. 107 of the Hearings cited in the text:

*Typical expenditures included by Court of Claims in gratuity set-offs*

| Case | Items | Amount |
|---|---|---|
| Crow, H-248 | Education of Indian children | $121,210.90 |
| Do | Unspecified appropriations with no showing of benefit. | 2,604,170.45 |
| Blackfeet, E-427 | Education at nonagency schools of individuals from the tribe. | 259,100.46 |
| Kaw, F-64 | Clothing | 7,466.83 |
| Do | Agricultural equipment | 3,694.68 |
| Do | Medical attention | 37,802.60 |
| Do | Removal of Indians | 805.76 |
| Do | Education | 170,697.18 |
| Do | Pay of agents | 31,188.31 |
| Do | Pay of farmers | 9,234.12 |
| Do | Miscellaneous agency expenses | 9,481.68 |
| Do | Expenses of appraising lands | 945.35 |
| Do | Expense of joint agency on the basis of percentage of population. | 72,159.51 |

adopted by Congress made expenditures for these purposes gratuities, in the absence of a controlling specific treaty provision.

Petitioner urges (Br. 54–55) that agents and interpreters were furnished to the Seminoles pursuant to specific treaty provisions. This is not the case. Ever since the Indian Trade and Intercourse Act of March 1, 1793, 1 Stat. 329, 331, it has been the consistent policy of Congress "in order to promote civilization among the friendly Indian tribes" to send agents to reside among them. Similarly it has been the practice of Congress to furnish an interpreter to each agency. Cf. Act of March 2, 1829, 4 Stat. 352; Act of June 30, 1834, 4 Stat. 735, 737. It is, of course, true that these services which are granted to all tribes as a matter of governmental policy might be secured to a particular tribe by treaty. And this may have been the situation with respect to the Seminoles between 1823 and 1834. The Seminoles, an off-shoot of the Creek Tribe, migrated to Florida subsequent to 1790.[54] By the Treaty of September 18, 1823, 7 Stat. 224, these Indians were given a tract of land which was described by metes and bounds and the United States agreed that "an agent, sub-agent, and interpreter, shall be appointed, to reside within the Indian boundary

[54] See Mills, *Lands of the Five Civilized Tribes* (1919), 151–153.

aforesaid."[55] This treaty remained in force until the Seminoles, by the Treaties of May 9, 1832, 7 Stat. 368, and March 28, 1833, 7 Stat. 423, agreed to migrate west of the Mississippi River and reunite with the Creeks. These new treaties by their very nature relieved the Government of its promise in the 1823 agreement to provide a separate agent and interpreter for the Seminoles. Accordingly, the Act of June 30, 1834, 4 Stat. 735, 736, ordered the Florida Agency discontinued, and the departmental regulations issued under that act in 1837 provided that the Creek Agency was to include the Seminoles. U. S. Indian Bureau Laws, etc., 1850, p. 19.

However, the reunion of the Creeks and Seminoles was shorflived. See Schmeckebier, *The Office of Indian Affairs* (1927) 100. In 1856, the Seminoles were given lands of their own. See Articles I and III of the Treaty of August 7, 1856, 11 Stat. 699, between the United States and the Creeks and the Seminoles. That treaty, after stating that all subsisting treaty stipulations between the Government and these tribes should "as far as practicable, be embodied in one comprehensive instrument", proceeded to enumerate (Article V) the treaty obligations which remained in force between the United States and the Creeks. Article

[55] Clearly, so far as petitioner is concerned, this treaty supplanted the Treaty of August 7, 1790, 7 Stat. 35, between the United States and the Creek Nation (cf. Br. 54).

VIII contains a comparable enumeration of the Government's obligations to the Seminoles. It is to be noted that the provisions with respect to agents and interpreters in the 1790 and 1823 treaties are not mentioned. Hence, the agents and interpreters furnished these tribes after 1856 were not required by specific treaty obligation but were furnished instead pursuant to the Government's general policy. Plainly the references to agents in Articles XV and XVII of the 1856 Treaty, relied on by petitioner (Br. 55–57), do not constitute a promise to maintain agents. Nor is any such promise to be found in the Treaty of March 21, 1866, 14 Stat. 755 (cf. Br. 56, 57). The general provisions to which petitioner refers (Br. 56) requiring the United States to make per capita payments, to provide rations, to distribute clothing, to survey boundaries, to erect a mill and other buildings, to keep out intruders, etc., are to be found in almost every Indian treaty. Notwithstanding such general provisions, it has, as we have seen (*supra*, page 80), been consistently held that moneys expended to compensate Indian agents who performed these and numerous other functions are gratuities.

Since moneys spent for the pay of agents are gratuities, it follows that expenditures for "Miscellaneous agency expenses", "Fuel, light and water", "Pay of interpreters" and of "miscellaneous employees" of the agency, and "Trans-

portation, etc. of supplies" for the agency [56] are likewise gratuities.

3. *Finding 12 (R. 17; Opinion, R. 34–35; Br. 53–61).*—Petitioner apparently admits (see note 37, page 65, *supra*) that the items "Education", "Expenses of delegations", "Feed and care of livestock", "Medical attention", and "Provisions and other rations" listed in Finding 12 were properly allowed as offsets. Thus, the only items covered by Finding 12 which petitioner disputes are precisely the same six items which were considered in Finding 11; no further argument concerning them is presented here.

4. *Finding 13 (R. 17; Opinion, R. 35–37, 41–42; Br. 64–73).*—Petitioner admitted in the court below (R. 37) that the items "Clothing", "Expenses of delegates", "Livestock", "Medical attention", and "Provisions and other rations" listed in Find-

[56] The item of $3,687.92 allowed in Finding 11 for "Transportation, etc., of supplies" possibly includes, in addition to charges for the transportation of agency supplies, and provisions and rations gratuitously furnished the Indians, charges for the transportation of supplies furnished the Seminoles pursuant to Article IX of the Treaty of August 7, 1856 (11 Stat. 699, 703). It is not believed that the cost of transporting to the Indians goods which the Government was by treaty obligated to give them can properly be made the basis of a gratuity offset. Accordingly, if the precise amount of this offset becomes material, a remand would be appropriate so that the Court of Claims can eliminate any transportation charges allocable to performance of the Government's obligation under Article IX of the 1856 Treaty.

ing 13 were proper offsets. The item "Education" was not allowed by the Court of Claims and need not now be considered. The items "Miscellaneous agency expenses" and "Pay of miscellaneous employees" have been dealt with in the discussion of Finding 11, *supra,* page 84.

There remain for consideration the following ten items: "Appraising", "Enrolling", "General office expenses", "Per capita payment expenses", "Preservation of records", "Probate expenses", "Protecting property interest", "Sale of townsites", "Surveying", "Surveying and allotting", and "Traveling expenses". The court below concluded that expenditures for those purposes were gratuitous. They represent expenditures incurred in substituting a system of individual ownership of land in severalty for the previous tribal ownership in common. The transformation was accomplished pursuant to an agreement with the Seminoles which contained no promise by the United States to pay the expenses attendant upon such a change in the tribal economy. Act of July 1, 1898, c. 542, 30 Stat. 567; Act of June 2, 1900, c. 610, 31 Stat. 250. This omission is significant in view of the fact that corresponding agreements with other members of the Five Civilized Tribes have contained express promises to pay particular portions of the expenses incident to the disposition of townsites and the allotment of tribal property in severalty. See Atoka agreement of June 28, 1898, 30 Stat. 495, 505, 509; Creek agreement of March

1, 1901, sec. 34, 31 Stat. 861, 871; Cherokee agreement of July 1, 1902, 32 Stat. 716, 724. The occasional appearance of these provisions for the defraying of expenses is indicative of an understanding by the parties that in the absence of such provisions the Indian tribes would pay the expenses entailed in carrying out the agreements; accordingly, these have been construed as not requiring the United States to bear expenses not expressly assumed by it. For example, in *Choctaw Nation* v. *United States,* 91 C. Cls. 320, 366, 367–371 (1940), certiorari denied, 312 U. S. 695, the claimant contended that the expenses of sale of the unallotted lands and other expenses incident to the carrying out of the Atoka and supplemental agreements should be borne by the United States. In rejecting that contention, the court said (pp. 368–371):

> * * * This contention is an unusual one and becomes, we think, untenable in view of the course of legislation involving proceedings and matters of this precise character. When the government assumes the expenses involved in the management, control, and disposition of property of an Indian tribe, it generally provides for so doing, and we cannot infer a liability in this regard where the legislation concerned with the subject-matter deals specifically with the details of procedure and makes no mention of such an assumed liability. * * * [pp. 368–369.]

Plaintiff contends that any doubt as to whether the plaintiff or the government was to bear the expenses of administering the agreements and the expenses of sale of the unallotted lands and the coal and asphalt lands and deposits, such doubt should be resolved in favor of plaintiff and the defendant held to have assumed such obligations. But this contention, in view of the circumstances and the purposes which brought about the execution of the agreements and the purposes intended to be accomplished thereby, does not help the plaintiff here. * * * [p. 370.]

In the second place the government was deriving no pecuniary benefit under the agreements. No monetary consideration passed thereunder from the government to the Indians or from the Indians to the government. There was no cession by plaintiff of any property to the government, nor was there any surrender by plaintiff of any rights to the property which it owned or to the proceeds from any disposition thereof. The gross proceeds and revenue derived by plaintiff under the Atoka agreements and from royalties and revenue were at least $24,800,000. If the agreements had been drawn so as to provide in all respects as they did, except that the affairs of the tribe should be managed, and its property controlled and disposed of in accordance with the terms agreed upon by the tribal government instead of the United States, it would be too clear for argument that the United States, at

whose instance the agreements were brought about as being for the best interests of the entire tribe, would not be obligated to bear any of the expenses. We think it is equally clear, when the agreements are interpreted in the light of their purpose due to existing conditions, that the assumption by the United States of control of the administration of the affairs of the tribe and the carrying out of the agreements did not impose upon it the obligation of paying all the expenses incident thereto. No instance in the history of Indian policy of the government is cited, and we find none, to show that the United States has, as a general policy, borne the expense of the distribution or sale of tribal property.

For these reasons we hold that the United States was not obligated under the agreements to bear the expenses incident to carrying out the provisions of the agreements and that the plaintiff is not entitled to recover the amounts herein claimed which were disbursed by the defendant from plaintiff's funds for such purposes. * * * [p. 371.]

Petitioner refers in the present case (Br. 65, 68) to a group of "Propositions" made to the Seminoles by the Dawes Commission in 1894 at the outset of the negotiations which led to the agreement of July 1, 1898 (*supra*, page 49) to support its contention that the Government undertook to pay the expenses of executing the agreement. However, mere offers made by the Commission in the

preliminary stages of negotiation could bind neither party. The fact that the substance of the second proposal on which petitioner particularly relies was not embodied in the final agreement points positively against petitioner's contention. It would, therefore, seem that the court below properly followed its prior decision in *Choctaw Nation* v. *United States, supra,* in holding that the United States was under no legal obligation to pay the expenses incident to the distribution in severalty of tribal property, and that such expenditures were therefore gratuitous in character.

5. *Findings 14, 15 and 16 (R. 18–19; Opinion, R. 37–38; Br. 53–61).*—What has been said earlier, in the discussion of Finding 11, page 84, *supra,* with respect to "Miscellaneous agency expenses", "Pay of miscellaneous employees", "Pay of interpreters", and "Transportation, etc. of supplies" [87] is equally applicable here.

Inasmuch as an examination of the supplemental report of the General Accounting Office (p. 53) shows that the "Annuity expenses" listed in Finding 15 were incurred in 1867, it would seem that this expenditure should not have been allowed as a gratuity offset; it was not until 1879 (see page 47, *supra*) that the tribe itself undertook the responsibility of making annuity payments to its members. Hence, the Government admits that

[87] This item is possibly subject to the same infirmity as the similar item in Finding 11 discussed in note 56, p. 85, *supra.*

the gratuity offset of $513.74 allowed with respect to Findings 14 and 15 together (R. 39, 42) should be reduced to $316.24.

It is to be noted that the expenditures listed in Findings 14 and 15 were made jointly for the benefit of the Seminoles and the Creeks, the court below determining the offset allocable to the Seminoles on the basis of proportionate population. It is not clear whether petitioner challenges that method of allocation here (see Br. 49, 53, 73, 74, 79). If such be petitioner's intention, it is to be observed that the practice of allocating on the basis of proportionate population expenditures made jointly for two or more tribes was sanctioned by this Court prior to the passage of the Act of August 12, 1935, and has been consistently followed by the Court of Claims. *The Sisseton and Wahpeton Indians,* 208 U. S. 561, 567, affirming 42 C. Cls. 416, 429 (1907); *Duwamish* et al. *Indians* v. *United States,* 79 C. Cls. 530, 560–564 (1934); *Kansas or Kaw Indians* v. *United States,* 80 C. Cls. 264, 296, 324 (1934); *Blackfeet* et al. v. *United States,* 81 C. Cls. 101, 115–116 (April 8, 1935); *Shoshone Tribe of Indians* v. *United States,* 82 C. Cls. 23, 57–59, 92 (December 2, 1935), 85 C. Cls. 331, 350–353, 358 (1937); *Eastern or Emigrant Cherokees* v. *United States,* 82 C. Cls. 180, 192–196 (December 2, 1935); *Choctaw Nation* v. *United States,* 91 C. Cls. 320, 353–354, 357 (1940). This practice had been brought to the attention of Con-

gress when it enacted the 1935 statute. Hearings, Committee on Appropriations (Subcommittee), H. R. 8554, 74th Cong., 1st sess., p. 107; see last item in table reproduced in note 53, page 81, *supra*.[58]

6. *Finding 17 (R. 19; Opinion, R. 38; Br. 53–64).*—Petitioner apparently does not contest (see note 37, page 65, *supra*) the items "Agricultural implements and equipment", "Feed and care of livestock", "Livestock", "Medical attention", and "Pay and expenses of farmers". Our argument with respect to Finding 11 (page 84, *supra*) is equally directed to show that the items here of "Pay of Indian agents", "Pay of miscellaneous employees", "Pay of skilled employees", "Miscellaneous agency expenses", "Fuel, light and water", and "Hardware, glass, oil and paints" were properly allowed. This leaves for further consideration two items, namely, "Pay and expenses of Indian police" and "General office expense".

a. Petitioner argues that the United States was obliged by treaty to remove intruders from the Seminole country and asserts that the Indian police force was organized for this purpose (Br. 60). We

[58] What is said in the text with respect to propriety of the method of allocation here employed by the Court of Claims applies with like force to the similar practice of the court below in allocating to the Seminoles a portion of the expenditures made gratuitously by the Government for the Five Civilized Tribes, which are covered by Findings 17 and 18.

think this is not the case. The Indian police force was established by the Act of May 27, 1878, 20 Stat. 63, 86, which provided that it was "to be employed in maintaining order and prohibiting illegal traffic in intoxicating liquor on the several Indian reservations." The many and varied duties performed by the Indian police are summarized in the Report of the Commissioner of Indian Affairs for 1880 at pages ix-xii. In addition to removing intruders, the Indian police were to "act as guards at annuity payments; render assistance and preserve order during ration issues; protect agency buildings and property; return truant pupils to school; search for and return lost or stolen property, whether belonging to Indians or white men; prevent depredations on timber, and the introduction of whiskey on the reservation; bring whiskey-sellers to trial; make arrests for disorderly conduct, drunkenness, wifebeating, theft, and other offenses; serve as couriers and messengers; keep the agent informed as to births and deaths in the tribe, and notify him promptly as to the coming on the reserve of any strangers, white or Indian." See also Regulations of the Indian Department, 1884, pp. 106–110; Schmeckebier, *The Office of Indian Affairs* (1927) 262–263. These latter were functions for the performance of which the Seminoles themselves would otherwise have provided, and the United States was under no obligation to pay salaries to members of the Seminole tribe for performing such

police duties. Accordingly, as the court below held, money paid for the expenses of Indian police was spent by the United States gratuitously.

b. The item "General office expense" in Finding 17 is, as petitioner points out (Br. 62–64), an expenditure incurred by the Dawes Commission prior to July 1, 1898.[39] That the Government was under no legal obligation to establish the Dawes Commission is not open to dispute. Therefore, the only question which can arise, in determining whether the expenditures of the Commission should be deducted as a gratuity, is whether these sums were expended "for the benefit" of the Seminole Nation.

The Dawes Commission was originally established for the sole purpose of negotiating agreements with the Five Civilized Tribes with a view to transforming their system of tribal ownership of land into one of individual ownership. Act of March 3, 1893, sec. 16, 27 Stat. 612, 645; see Report of the Secretary of the Interior, 1895, p. xciv; *id.*, 1898, p. xxix. But the Commission was soon given additional duties. In 1896 and 1897 it was directed to prepare tribal rolls without which no allotment in severalty would be possible. Act of June 10, 1896, 29 Stat. 321, 339–340; Act of June 7, 1897, 30 Stat. 62, 84; see Cohen, *Handbook of Federal*

[39] "General office expenses" incurred by the Dawes Commission after ratification of the Seminole Agreement on July 1, 1898, 30 Stat. 567, stand on a different footing. See pp. 86–90, *supra*, and p. 95, *infra*.

*Indian Law* (1941) 431; Report of the Secretary of the Interior, 1896, p. cl.

It thus appears that a portion of the item now under discussion was expended in negotiating agreements with the Five Tribes and that a portion was expended in preparing tribal rolls, the amount for each purpose not being shown separately by the present record. See Report of the Secretary of the Interior, 1896, pp. cliii, clv; *id.*, 1897, pp. cxx-cxxi; *id.*, 1898, p. xxxi. The Government concedes that the portion of this item expended in the negotiation of agreements with the Five Tribes should not have been offset. However, we believe that the Government is entitled to a credit for expenses incurred by the Commission in preparing the rolls which, with subsequent additions and corrections, served as a basis for the allotment of tribal property among individual Indians after 1898. Cf. *Choctaw Nation* v. *United States, supra;* see pages 86–90, *supra.* Therefore, if computation of the amount allocable to expenditure for each of these purposes separately becomes important in this case, the matter should be remanded to the Court of Claims with directions to make the necessary determination.

7. *Finding 18 (R. 19–20; Opinion, R. 37–38; Br. 73–85).*—Petitioner states (Br. 74) that the Government in the Act of July 1, 1898, 30 Stat. 567, agreed to individualize the land holdings of the Seminole Nation and to pay the expenses of admin-

istration. Petitioner then asserts (Br. 75) that the following items were either directly or incidentally disbursed pursuant to that agreement:

Allotting
Appraising
Appraising and selling lands
Appraisal and sale of restricted land
Automobiles and repairs
Copying allotment records
Equalization of allotments expenses
Examining records in disputed citizenship cases
Feed and care of the horses
Fuel, light, and water
General office expenses
Household equipment
Incidental expenses
Investigating leases
Leasing of mineral and other lands
Miscellaneous agency expenses
Oil and gas expenses
Oil and gas mining supervision, allotted lands
Pay and expenses of Indian police
Pay of Indian agents
Pay of clerks
Pay of Indian inspectors
Pay of interpreters
Pay of miscellaneous employees
Pay of superintendents
Per capita payment expenses
Preservation of records
Protecting property interest of restricted members
Provisions and other rations
Purchase of horses
Removal of alienation restrictions
Sale of allotted lands
Sale of restricted lands
Sale of town lots
Sale of town sites
Sale of unallotted lands
Surveying
Surveying and allotting
Surveying segregated coal and asphalt lands
Surveying, sale, etc., of lands
Timber estimating
Transportation, etc., of supplies
Traveling expenses

Petitioner therefore concludes that these items should not have been allowed as gratuity offsets. But, as we have urged (*supra*, page 90), the Government did not agree to pay any part of the expenses incident to the allotment in severalty of Seminole tribal land. Moreover, many of the items listed by petitioner, *e. g.*, "Pay of Indian agents", "Pay of interpreters", "Pay and expenses of Indian police", are not attributable to the allotment program but were expenditures made pursuant to the Government's general policy of providing such services to Indian tribes. As we have shown in the discussion of Findings 11 and 17 (*supra*, pages 80–85, 92–95) such expenditures are gratuities.

The next item of which petitioner complains (Br. 76–77) is an expenditure of $2,179,846.86 for "Education". It is urged that this item is erroneous insofar as it includes $1,693,525.90 spent for the maintenance of the Cherokee Orphans Training School. We think the allowance of this expenditure was proper because the industrial school in question was maintained "for the orphan Indian children of the Five Civilized Tribes". Section 18 of the Act of June 30, 1913, 38 Stat. 77, 95. The fact that there happened to be no Seminole orphans actually in attendance during the years when this money was spent is not material.

Petitioner is under a misapprehension when he argues that the item of $2,179,846.86 includes $95,758.84 spent in "aid of common schools" of the State of Oklahoma. Except for an expenditure of $2,569.00 in 1934, all moneys expended "in aid of common schools" have been excluded from the gratuity offset claim of $2,179,846.86 for "Education".[60] Furthermore, expenditures in "aid of common schools" are proper gratuity offsets; money expended to make possible the education of Indian children in the public schools of Oklahoma redounded to the benefit of the tribe. Cf. *Blackfeet* et al. *Nations* v. *United States*, 81 C. Cls. 101, 138–139, 140–141 (1935); *Shoshone Tribe of In-*

[60] A breakdown of this item, taken from the Supplemental Report of the General Accounting Office, is printed in the Appendix, pp. 65–66.

*dians* v. *United States*, 82 C. Cls. 23, 56, 59 (1935); 85 C. Cls. 331, 349–350, 352, 357 (1937).

The remaining items in Finding 18 are challenged by petitioner principally on the ground that they were expended directly for the use of individual Indians rather than of the tribe as a whole (Br. 77–85). But an expenditure by the United States of funds, for agricultural aid, for hospitals, and for probate expenses, immediately benefiting individuals of the Seminole Nation, according to need, is an expenditure for a public purpose advancing the general welfare. Cf. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 518; *Cochran* v. *Board of Education*, 281 U. S. 370, 375. The *dictum* in *Osage Tribe of Indians* v. *United States*, 66 C. Cls. 64, 82, upon which petitioner relies (Br. 77), to the effect that expenditures for the education of individual Indians at nonagency schools was not a proper offset (under a special jurisdictional statute) against the tribe as a whole, has since been repudiated. *Blackfeet* et al. *Nations* v. *United States*, 81 C. Cls. 101, 138–139, 140–141 (April 8, 1935).

This constructional history was before Congress when it passed the 1935 act. See page 72, *supra*. If moneys expended for the education of individual Indians at nonagency schools are proper gratuity offsets against a tribe of Indians, it follows that expenditures in the cases of individuals for agricultural aid, hospitalization, and probate expenses are similarly chargeable against

the tribe. The Court of Claims has uniformly so held. *Choctaw Nation* v. *United States,* 91 C. Cls. 320, 354–356 (1940), certiorari denied 312 U. S. 695; *Chippewa Indians* v. *United States,* 91 C. Cls. 97, 121–128 (1940); *Choctaw & Chickasaw Nations* v. *United States,* 88 C. Cls. 271, 283 (1939); *Shoshone Tribe of Indians* v. *United States,* 82 C. Cls. 23, 56, 59 (1935); 85 C. Cls. 331, 349–350, 352, 357 (1937); Cf. Schmeckebier, *The Office of Indian Affairs* (1929), pp. 518–519 (Appendix, pp. 67–68).

8. *Finding 19 (R. 20; Opinion, R. 38; Br. 85–86).*—The court held in Finding 17 that a total of $305,292.80 had been gratuitously spent by the Government for the benefit of the Five Tribes during the period from 1867 to 1898, and in Finding 18 that $11,416,066.55 had been similarly expended from 1899 to 1934 (R. 19–20). In Finding 19 the court concluded that between 1861 and 1897 the Seminoles composed approximately 4.38 percent of the population of the Five Tribes, and that between 1908 and 1928 about 3.08 percent (R. 20). No finding was made with respect to the proportionate population of each of these tribes during the periods from 1898 to 1907 and from 1929 to 1934. The court did, however, make a finding that during the entire period from 1861 to 1928 the Seminoles composed 3.72 percent of the Five Tribes. On the basis of this finding the court allowed the Government an offset of 3.72 percent of the moneys gratuitously expended by it for the

benefit of the Five Tribes from 1867 to 1934 (R. 42).[81]

Petitioner objects (Br. 85–86) to the use of this average figure of 3.72 percent in determining the amount of gratuity offsets chargeable against the Seminoles for the period covered by Finding 18 (1899 to 1934); it contends (Br. 86) that any offsets properly allowable in this finding should be computed at the lower percentage figure of 3.08.[82] Since the court made specific findings respecting the population of these tribes for different periods before and after 1898, we agree that it would have been more accurate to compute the gratuity offsets in Finding 17 (1867 to 1898) on a percentage basis of 4.38, and those in Finding 18 (1899 to 1934) on a percentage basis of 3.08 (or whatever the correct percentage may be for the entire period from 1899 to 1934 if it is not 3.08). Should the precise amount of the gratuity offsets allowed by the Court of Claims in Findings 17 and 18 become important, we suggest that they be calculated on the basis of the figures just referred to, or if the finding of a population ratio of 3.08 for the period from 1908 to

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[81] Petitioner, in addition to challenging the court's derivation and use of percentages, contends that any allocation of the gratuities listed in Finding 18 to the Seminoles is improper without proof that the amounts charged to the Seminole Nation were actually expended for the tribe or for individual Seminoles. The practice followed here by the Court of Claims has been sanctioned by this Court and has received the implied approval of Congress. A discussion of this point appears earlier in our brief, at pp. 91–92, *supra*.

[82] Presumably, if the figure of 3.08 be adopted as to Finding 18, the figure of 4.38 would then be used for the period covered by Finding 17 (1867 to 1898).

1928 is thought insufficiently approximate to represent the entire period from 1899 to 1934, that the matter be remanded with directions to make more complete findings.

## CONCLUSION

The Court of Claims correctly determined that the Government's liability to the Seminole Nation on all of the five items of its claim is $18,388.30. Petitioner concedes that the Government has proper offsets in excess of that amount. The judgment of the court below dismissing the petition should therefore be affirmed. In the event that this Court should find that the United States is liable in an amount probably[63] exceeding the admitted offsets, we urge that the cause be remanded to the Court of Claims, with directions to strike a balance of accounts between the United States and the Seminole Nation and to specify which gratuity offsets are exhausted to cancel the Government's liability to petitioner.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General,*
NORMAN M. LITTELL,
*Assistant Attorney General,*
CHARLES R. DENNY,
VERNON L. WILKINSON,
LEONARD C. MEEKER,
*Attorneys.*

MARCH 1942.

[63] See n. 38, pp. 67–68, *supra.*

U. S. GOVERNMENT PRINTING OFFICE: 1942